(16,738.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 203.

THE WASHBURN AND MOEN MANUFACTURING COMPANY, PETITIONER,

vs.

THE RELIANCE MARINE INSURANCE COMPANY (LIMITED).

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

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a United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error,
v.
WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error. } No. 157.

Error to the circuit court of the United States for the district of Massachusetts.

Judgment in circuit court (Putnam J.), October 2, 1897.

Certified Copy of Record and All Proceedings in said Cause to and Including November 10, 1897.

Eugene P. Carver, Edward E. Blodgett, for Washburn and Moen Manufacturing Company.
Francis C. Lowell, Frederick J. Stimson, A. Lawrence Lowell, for Reliance Marine Insurance Company.

1 United States Circuit Court of Appeals for the First Circuit, October Term, 1895.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error,
v.
WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error. } No. 157.

Writ of Error in No. 156.

[L. S.] UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before

you, or some of you, between The Washburn and Moen Manufacturing Company, plaintiff, and The Reliance Marine Insurance Company, defendant, a manifest error hath happened, to the great damage of the said plaintiff, The Washburn and Moen Manufacturing Company, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the first circuit, together with this writ, so that you have the same at the city of Boston, Massachu-
2 setts, on the twenty-fifth day of November next, in the said circuit court of appeals, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the eighteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
W. L. PUTNAM,
U. S. Circuit Judge.

Return of Circuit Court Thereon.

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss*:

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the United States circuit court of appeals for the first circuit, as within commanded.

In testimony whereof, I, Alexander H. Trowbridge, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court this twenty-third day of November, A. D. 1895.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

Writ of Error in No. 157.

[L. S.] UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The Washburn and Moen Manufacturing Company, plaintiff, and The Reliance Marine
3 Insurance Company, defendant, a manifest error hath happened, to the great damage of the said defendant, The Reliance Marine Insurance Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States circuit court of appeals for the first circuit, together with this writ, so that you have the same at the city of Boston, Massachusetts, on the twenty-fifth day of November next, in the said circuit court of appeals, that, the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the eighteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five.

ALEX. H. TROWBRIDGE,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
W. L. PUTNAM,
U. S. Circuit Judge.

Return of Circuit Court Thereon.

Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss*:

And now, here, the judges of the circuit court of the United States, in and for the district of Massachusetts, make return of this writ by annexing hereto and sending herewith, under the seal of said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to

the United States circuit court of appeals for the first circuit, as within commanded.

In testimony whereof, I, Alexander H. Trowbridge, clerk of said circuit court of the United States, in and for the district of Massachusetts, have hereto set my hand and the seal of said court, this twenty-third day of November, A. D. 1895.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

4 *Transcript of Record of Circuit Court.*

(Filed in circuit court of appeals Nov. 25, 1895.)

UNITED STATES OF AMERICA, *District of Massachusetts,* } ss:

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Wednesday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety-five, before the Honorable Le Baron B. Colt, circuit judge.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, *v.* RELIANCE MARINE INSURANCE COMPANY, Defendant. } No. 356, Law Docket.

In an action of contract, *ad damnum*, $100,000.

The writ in this cause is dated Sept. 27, 1893, and is made returnable before the justices of the superior court of the Commonwealth of Massachusetts, to be holden at Boston, within and for the county of Suffolk, on the first Monday of November, A. D. 1893. After due entry of this writ in said superior court, this cause was removed to this circuit court and here entered at the May term, A. D. 1894, when and where the parties appeared by their respective attorneys. Upon the entry of this cause in this circuit court, attested copies of papers on file in said superior court were filed in this court, as follows:

(1.) *Writ.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk,* } ss:

[L. S.] To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of the Reliance Marine Insurance Company, a corporation duly organized
5 and existing under and by virtue of the laws of the Kingdom of Great Britain and Ireland, and having a usual place of business in Boston, in the county of Suffolk and Commonwealth aforesaid, to the value of one hundred thousand (100,000) dollars,

and summon the said defendant (if it may be found in your precinct) to appear before our justices of our superior court, to be holden at Boston, within and for our said county of Suffolk, on the first Monday of November next, then and there in our said court to answer unto the Washburn & Moen Manufacturing Company, a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Massachusetts, and having a usual place of business in Worcester, in the county of Worcester and Commonwealth aforesaid, in an action of contract to the damage of the said plaintiff (as it says) the sum of one hundred thousand (100,000) dollars, which shall then and there be made to appear, with other due damages. And whereas the said plaintiff says that the said defendant has not in its own hands and possession goods and estate to the value of one hundred thousand (100,000) dollars aforesaid, which can be come at to be attached, but has intrusted to and deposited in the hands and possession of the Atlantic national bank, a corporation duly organized and existing under and by virtue of the laws of the United States of America, and having a usual place of business in said Boston, trustee of the said defendant's goods, effects and credits, to the said value: we command you, therefore, that you summon the said supposed trustee (if it may be found in your precinct) to appear before our justices of our said court, to be holden as aforesaid, to show cause, if any it has, why execution to be issued upon such judgment as the said plaintiff may recover against the said defendant in this action (if any) should not issue against its goods, effects or credits, in the hands and possession of the said trustee.

And have you there this writ with your doings therein.

Witness, Albert Mason, Esquire, at Boston, the twenty-seventh (27th) day of September, in the year of our Lord one thousand eight hundred and ninety-three.

JOS. A. WILLARD, *Clerk.*

Copy.

Attest: JOS. A. WILLARD, *Clerk.*

6 *Return on Writ.*

SUFFOLK, *ss:*

BOSTON, *Sept.* 28, 1893.

By virtue hereof, I this day, at thirty-five minutes past nine o'clock a. m., summoned the within-named trustee, the Atlantic national bank, to appear and show cause at court, as within directed, by delivering to James T. Drown, its cashier, an attested copy of this writ, and afterwards, on said twenty-eighth day of September, I attached a chip as the property of the within-named defendant, The Reliance Marine Insurance Company, and summoned it to appear and answer at court, as within directed, by delivering an attested copy of this writ to the insurance commissioner of this Commonwealth, he being the true and lawful attorney to accept

service for said company, and paid him the statute fee of two dollars.

FRED H. SEAVEY,
Deputy Sheriff.

Service and travel	$1 08
Copies	2 00
Paid commissioner	2 00
	$5 08

(2.) *Declaration.*

(Filed in State court Nov. 6, 1893.)

First Count. And the plaintiff says the defendant company made to it a policy of insurance in the sum of forty-eight thousand eight hundred dollars ($48,800), on the cargo of wire on board the schooner Benjamin Hale valued at said sum, said insurance being against the perils of the sea and other perils therein mentioned, at and from Boston to Galveston or Velasco, Texas. A copy of said policy is hereto annexed, marked "A," and made a part of this declaration.

That while the said schooner Benjamin Hale was proceeding on said voyage with said cargo on board, she struck a rock, filled with water and sank, and the said cargo of wire became totally lost by perils insured against.

7 That while the said schooner with the said cargo of wire on board was in peril, the said plaintiff duly abandoned the said cargo to the said defendant company on April 29, 1893, being the date when the plaintiff first heard of said loss.

That the loss of the said cargo by perils insured against amounted to more than one-half of the whole value of said cargo as declared in said policy, and that the plaintiff is entitled to recover a total loss. The defendant company had due notice and proof of loss of said cargo April 29, 1893. The defendant company was bound by the terms of said policy to pay the plaintiff the sum of forty-eight thousand eight hundred dollars ($48,800) within thirty (30) days from said date, and the defendant company owes the plaintiff the said sum of money.

Second Count. And the plaintiff duly demanded said sum of the defendant company on May 29, 1893, and the said defendant company owes the plaintiff for interest to the date of the writ the sum of nine hundred and seventy-six dollars ($976).

THE WASHBURN & MOEN MANUFACTURING COMPANY,
By CARVER & BLODGETT, *Its Attorneys.*

Cargo. No. 200.

The Reliance Marine Insurance Company, Limited.

Washburn and Moen Mfg. Company, on account of whom it concerns,

In case of loss to be paid to said company, do make insurance and cause wire to be insured, lost or not lost, at and from Boston to Galveston *and/or* Velasco, upon all kinds of lawful goods and merchandises laden or to be laden on board the good schooner called the Benjamin Hale —— —— whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandises, -rom and immediately following the loading thereof on board
8 of the said vessel, at —— as aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at ——as aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said goods and merchandise hereby insured are valued (premium included) at sum insured.

Touching the adventures and perils which the said assurers are contented to bear and take upon themselves in this voyage, subject as hereinafter provided, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of all kings, princes or people, of what nation, condition or quality soever, barratry of the masters and mariners, and all other perils, losses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, their factors, servants and assigns, to sue, labor, and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said assurers will contribute according to the rate and quantity of the sum herein insured; having been paid the consideration for this insurance, by the assured or — assigns, at and after the rate of, as indorsed, one and one-fourth per cent.

The assurers are to be entitled to premiums at their usual rate on all shipments reported or not. It is warranted by the assured to report every shipment on the day of receiving advices thereof, or as soon thereafter as may be practicable, when the rate of premium shall be fixed by the assurers.

And in case of loss, such loss to be paid in thirty days after proof

of loss, and proof of interest in the said — (the amount of the premium, if unpaid, being first deducted), but no partial loss
9 or particular average shall in any case be paid, unless amounting to five per cent., provided always, and it is hereby further agreed, that if the said assured shall have made any other assurance upon the premises aforesaid, prior in day of date to this policy, then the said assurers shall be answerable only for so much as the amount of such prior assurance may be deficient toward fully covering the premises hereby assured; and the said assurers shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises, subsequent in day of date to this policy, the said assurers shall nevertheless be answerable, subject as hereinafter provided, for the full extent of the sum insured by this policy, without right to claim contribution from such subsequent assurers, and shall accordingly be entitled to retain the premium by them received, in the same manner as if no such subsequent assurance had been made. Other insurance upon the premises aforesaid, of date the same day as this policy, shall be deemed simultaneous herewith; and the said assurers shall not be liable for more than a ratable contribution in the proportion of the sum by them insured to the aggregate of such simultaneous insurance. It is also agreed that the property be warranted by the assured free from charge, damage or loss, which may arise, in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war.

Warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured; nor until ninety days after notice of said condemnation is given to the assurers. Also warranted not to abandon in case of blockade, and free from any expense in consequence of capture, seizure, detention or blockade, but in the event of a blockade to be at liberty to proceed to an open port and there end the voyage.

And the assurers are contented, and do promise and bind themselves to the assured, their executors, administrators or assigns, for the true performance of the premises, for the amount herein insured.

In witness whereof, the undersigned, on behalf of the said Reliance Marine Insurance Company, Limited, has hereunto set his hand in New York, the fifteenth day of March, 1893.

10 MEMORANDUM.—It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and

cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flaxseed and bread are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent., unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy (except caused by actual contact of sea water with the articles damaged), occasioned by sea perils. In case of partial loss by sea, damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandises as far as practicable. Not liable for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return premium, in whole or in part, one-half per cent. upon the sum insured is to be retained by the assurers.

$48,800. Forty-eight thousand eight hundred dollars.

HENRY DESPARD, *Attorney.*

This policy is not valid until countersigned by Edmund A. Poole, agent at Boston.

EDMUND A. POOLE, *Agent.*

Sum insured, $48,800. Premium, $610.

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

11 (3.) *Claim for Jury.*

(Filed in State court Nov. 6, 1893.)

In the above action we claim a jury.

CARVER & BLODGETT, *Judges.*

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

(4.) *Appearance for Defendant.*

(Filed in State court Nov. 16, 1893.)

In the above action we appear for defendant.

LOWELL, STIMSON & LOWELL,
709 *Exchange Building.*

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

(5.) *Petition for Removal.*

(Filed in State court Nov. 24, 1893.)

Petition for removal of this cause to the United States circuit court for the district of Massachusetts.

To the honorable the justices of the superior court of the Commonwealth of Massachusetts for the county of Suffolk:

Your petitioner respectfully shows that it is the defendant in the above-entitled suit, and that it is a corporation duly established under the laws of the Kingdom of Great Britain and Ireland, and that it is a non-resident of the State in which said suit was brought, to wit, the said State of Massachusetts, and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

That the said suit is of a civil nature at common law, to wit, an action of contract for the recovery of sums alleged to be due under a policy of marine insurance, executed the fifteenth day of March, A. D. 1893.

That the controversy in the said suit is wholly between a citizen of a State and a citizen of a foreign State, to wit, between
12 your said petitioner, who avers that it was at the time of the bringing of this suit, and still is, a citizen of the United Kingdom of Great Britain and Ireland, and the said plaintiff, who, as your petitioner avers, was then and still is a citizen of the State of Massachusetts.

And your petitioner offers herewith a bond with good and sufficient surety for its entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make an order for the removal of this cause to said circuit court, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States, in and for the district of Massachusetts, and it will ever pray.

RELIANCE MARINE INSURANCE COMPANY, LTD.,
p. p. HENRY DESPARD,
Attorney, Petitioner.

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

(Indorsement:) 29 Nov., '93. Pet'n accepted.

(6.) *Bond on Removal.*

(Filed in State court Nov. 24, 1893.)

Know all men by these presents, that The Reliance Marine Insurance Company, a corporation duly incorporated under the laws of the United Kingdom of Great Britain and Ireland, as principal, and that Edmund A. Poole and William H. Lord, as sureties, are holden and stand firmly bound unto the Washburn & Moen Manufacturing Company, a corporation established under the laws of the Commonwealth of Massachusetts, in the penal sum of five hundred dollars, for the payment whereof, well and truly to be made unto the said Washburn & Moen Manufacturing Company, its successors and assigns, we bind ourselves jointly and severally by these presents. Upon condition, nevertheless, that whereas the said Reliance Marine Insurance Company has petitioned the superior court of the Commonwealth of Massachusetts, in and for the county of Suffolk, for the removal of a certain cause therein pending, wherein the said Washburn & Moen Manufacturing Company is plaintiff, and
13 the said Reliance Marine Insurance Company is defendant, to the circuit court of the United States, in and for the district of Massachusetts (said cause being numbered 8273).

Now, if the said Reliance Marine Insurance Company shall enter in the said court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise it shall remain in full force and virtue.

In witness whereof we have hereunto set our hands and seals this sixteenth day of November, A. D. 1893.

RELIANCE MARINE INSURANCE CO., LTD.,
p. p. HENRY DESPARD, *Attorney.* [SEAL.]
EDMUND A. POOLE. [SEAL.]
WILLIAM H. LORD. [SEAL.]

Copy.
Attest: JOS. A. WILLARD, *Clerk.*

(Indorsement:) 29 Nov., '93. Bond accepted.

This cause, entered as aforesaid at the May term of this court, A. D. 1894, was thence continued to the October term, A. D. 1894, when the following amendment to declaration was filed and allowed by the court, the Honorable William L. Putnam, circuit judge, sitting.

Amendment to Declaration.

(Filed in circuit court Oct. 19, 1894.)

And now comes the plaintiff in the above-entitled action and asks to amend his declaration as filed in said case by adding to the copy

of said policy of insurance the further clauses hereto annexed, marked "A," which, being in the margin of said policy, were, through inadvertence, omitted.

THE PLAINTIFF,
By EUGENE P. CARVER,
Its Attorney.

Oct. 24, 1894. PUTNAM, J.: Amendment allowed.

Proof of loss to be authenticated by the agent of the company, if there be one at the place such proofs are taken, or in case
14 there be none, by the correspondent of the National Board of Marine Underwriters of New York.

Cargo on deck free from claims or loss by wet, breakage, leakage, or exposure.

The assurers not to be liable under this policy for more than $— by any one vessel, at one time, unless otherwise agreed upon at the time of indorsement.

Proof of loss to be authenticated by the agent of the assurers, if there be one at the place such proofs are taken.

Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation or by or from any officer, civil or military, or other person claiming to act in their name or under their authority, or in their behalf.

This policy to be deemed continuous, and to cover as above until discontinued by either party or giving the other — days' notice.

Free of particular average, but liable for absolute total loss of a part if amounting to five (5 %) per cent.

At the same term the following demurrer was filed:

Demurrer.

(Filed Oct. 25, 1894.)

And now comes the defendant in the above-entitled case, and, demurring to the plaintiff's declaration as amended, says that the said declaration and the matters therein contained, in manner and form as the same are stated and set forth, are not sufficient in law for the plaintiff to have his action against the defendant, for that the first count in said declaration is double, repugnant, ambiguous and multifarious, in that it does not clearly state whether the plaintiff claims to recover of the defendant by reason of an absolute and actual total loss, or by reason of a constructive total loss of the goods insured; and also, for that if the plaintiff intends by said first count to recover against the defendant for a constructive total loss by reason of the loss of more than half of the whole
15 value of said cargo and of the abandonment thereof, as the plaintiff says in said first count, and as the defendant is advised and believes, then it appears by said first count, and by the terms of the policy set forth therein, that the plaintiff is not legally

liable for such constructive total loss of the cargo, insured or otherwise; and also, for that it appears by the policy set forth in said first count that the plaintiff is entitled to recover thereunder only for an actual total loss and destruction of all the goods insured, or for the actual total loss and destruction of a part of said goods, and neither such actual total loss and destruction of the whole, nor such actual total loss and destruction of a part, is properly averred in said first count.

And demurring to the second count in said declaration, the defendant says that the same is not sufficient in law, for that the interest claimed in said second count is due only upon the obligation declared on in said first count and is wholly dependent thereon; wherefore, unless the said first count is sustained the second falls with it.

Wherefore, for want of a sufficient declaration, the defendant prays judgment.

RELIANCE MARINE INS. CO.,
By LOWELL, STIMSON & LOWELL,
Its Attorneys.

I hereby certify that I am of opinion that there is such probable ground in law for the above demurrer as to make it a fit subject for judicial inquiry, and that the same is not intended for delay.

FRANCIS C. LOWELL.

Oct. 25, 1894.

This cause thereupon came on to be heard and was fully heard by the court upon the foregoing demurrer, the Honorable William L. Putnam, circuit judge, sitting.

On the first day of March, A. D. 1895, the opinion of the court was filed, and thereupon the demurrer was overruled, and the defendant was ordered to answer on or before the eleventh day of March, 1895.

On the ninth day of March the following answer was filed:

16 *Answer.*

(Filed March 9, 1895.)

And now comes the defendant, and for answer denies each and every allegation in the plaintiff's declaration contained.

And further answering, the defendant says that it is not informed if the policy of insurance was issued and executed as set out in the plaintiff's declaration, but it requires the plaintiff to prove the same; that it is not informed if the schooner Benjamin Hale, in the plaintiff's declaration mentioned, was proceeding on its voyage with the cargo insured on board, or if the said schooner struck a rock, but it requires the plaintiff to prove the same. The defendant denies that the said schooner filled with water and sank, and that the said cargo became totally lost by perils insured against, but avers, on the contrary, that a large part of the said cargo arrived at Velasco, its port

of destination. The defendant denies that the plaintiff duly abandoned the said cargo to the defendant at the date and in the manner in the plaintiff's declaration set forth. It denies that the loss of the said cargo by perils insured against amounted to more than one-half of the declared value of said cargo, and it denies that the plaintiff is entitled to recover a total loss of the same. It denies that it had due notice and proof of loss of said cargo on April 29, 1893. It denies that it was bound by the terms of the said policy to pay to the plaintiff the sum mentioned in the declaration at the time mentioned therein, and it denies that it owes the plaintiff the said sum of money. It is not informed if the plaintiff duly demanded the said sum of it, the defendant, on May 29, 1893, but requires the plaintiff to prove the same; and it denies that it owes the plaintiff nine hundred and seventy-six dollars, or any sum whatsoever, for interest or otherwise.

And further answering, the defendant says that by the terms of the said policy it was provided, among other things, that wire of all kinds was warranted by the defendant free from average unless general; and by the terms of the said policy, and at the request of the defendant in applying therefor, it was further provided that the wire insured should be free of particular average, that is to say, not insured against damage or partial loss; but that the defendant
17 should be liable for absolute total loss of a part, if such absolute total loss of a part amounted to five per cent. of the cargo insured. And the defendant says that in consideration of the insertion in the policy of the clause last mentioned, limiting the liability of the defendant, as aforesaid, the premium charged by the defendant to the plaintiff was materially reduced; the said reduction in the premium charged by the defendant being made to correspond with the diminished liability incurred by the defendant. Wherefore the defendant says that, by the terms of the said policy, it did not incur any liability for any injury or damage to the cargo of wire insured, unless there was an actual total loss of the same, or an actual total loss of a part, as aforesaid. And the defendant says that even if it be true, as set forth in the plaintiff's declaration, that the loss of the said cargo by perils insured against amounted at the time of said alleged abandonment to more than one-half of the declared value of said cargo, that is to say, if there was at that time what is known as a constructive total loss of the said cargo, yet that, by the terms of the said policy, the defendant is not liable for the said constructive total loss, but only for an actual total loss, as aforesaid. And the defendant denies that there was an actual total loss of said cargo; but affirms that a large part, to wit, more than half, of said cargo reached the port of destination; and avers that the damage suffered by the said cargo was in great part caused by the negligent treatment and exposure of the said cargo by the plaintiff, its agents and consignees; and the defendant says that it offered to the plaintiff to ascertain if there had been an actual total loss of a part of said cargo caused by perils insured against, amounting to five per cent. or more; and the defendant offered, upon the ascertainment thereof, if it should appear that there had been such an actual total loss of a

part, as aforesaid, to pay to the plaintiff for said actual total loss of a part, as aforesaid; but that the plaintiff has refused to permit the ascertainment of the facts aforesaid, wherefore the defendant has been and still is unable to ascertain if it owes anything to the plaintiff for an actual total loss of a part, as aforesaid, and in any case, the defendant says that no claim for such actual total loss of a part is made in the plaintiff's declaration and cannot be recov-
18 ered thereunder; wherefore the defendant says that *he* does not owe the plaintiff anything.

RELIANCE MARINE INSURANCE COMPANY,
By LOWELL, STIMSON & LOWELL,
Its Attorneys.

This cause was thence continued to this present May term, A. D. 1895, and issue having been joined, this cause is committed to a jury, sworn according to law to try the issue, the Honorable William L. Putnam, circuit judge, sitting. The said jury, after hearing all matters and things concerning the same, on the fourteenth day of June return the following verdict and special finding:

Verdict.

June 14, 1895.

The jury find for the plaintiff, and assess damages in the sum of twenty five hundred dollars.

SAMUEL G. DEXTER, *Foreman.*

Special Finding.

June 14, 1895.

The jury find that there was a constructive total loss.

SAMUEL G. DEXTER, *Foreman.*

On the second day of October, A. D. 1895, the following bill of exceptions was filed and allowed by the court:

Plaintiff's Bill of Exceptions.

(Filed and allowed Oct. 2, 1895.)

This is an action of contract on a policy of marine insurance. The action was commenced in the superior court in the county of Suffolk, Commonwealth of Massachusetts, in September, 1893, and removed upon defendant's petition to this court.

It is an action to recover for the total loss of a cargo of wire shipped on board the schooner Benjamin Hale, at the port of Bos-
19 ton, to be carried to the port of Velasco, a port in Texas.

At the trial of the case, the policy of insurance issued by the defendant company was admitted in evidence. A copy of the same is annexed hereto, marked "Exhibit 1."

At the trial of the case, the plaintiff introduced evidence tending to show that on March 29, 1893, it shipped at Boston a cargo of wire, of which it was the sole owner, on board of the schooner Benjamin Hale, and received from her master a bill of lading which was duly admitted in evidence, a copy of which is hereto annexed, marked "Exhibit 4."

A copy of the noted protest and also of the extended protest of the master and other officers of the schooner Benjamin Hale, dated April, 1893, is hereto annexed, marked "Exhibit 9," and were duly admitted to evidence.

There was evidence sufficient under the rulings of the court to warrant a jury in finding that there was a constructive total loss of the said cargo by perils insured against, provided the plaintiff could recover for a constructive total loss under the policy of insurance sued upon.

The plaintiff introduced further evidence as follows:

EDMUND A. POOLE of Boston, the agent of the defendant company since March, 1893, testified that he countersigned the insurance policy and delivered the same to the agent for the plaintiff. (A copy of which is hereto annexed marked "Exhibit 1.")

That he first heard of the loss in 1893; that he received an abandonment of the cargo to him by letter; that he had some conversation with Mr. Bates, the agent for the plaintiff, but does not remember whether it was about the loss or other business; that he received a certified copy of the protest on the schooner Benjamin Hale, a copy of the bill of lading and also of the invoice; does not remember that he called for any further proof of loss. He understood that a charter was made for the schooner Cactus to carry the cargo from Key West to Velasco; does not remember the conversation; had some talk with Mr. Randall but does not remember that it was in relation to the charter of the schooner Cactus. It might have been before the charter was made or it might have been after; that a person by the name of Mereno was the agent of the National Board of Marine Underwriters of New York, of which association the defendant company was a member. He presumes this association acted in behalf of the underwriters on vessel, freight and cargo. Doesn't remember having any conversation with Captain Hall or Mr. Gore, or the owners of the Benjamin Hale, with relation to forwarding the cargo from Key West to Velasco. Doesn't think the Reliance Company took charge of the cargo at Velasco. Doesn't think they advanced any money for that purpose. He did not.

On cross-examination he states that he declined the abandonment by letter dated "Boston, May 1, 1893," and put in as evidence in the same, marked "Exhibit 6;" that the defendant company never received any of the proceeds of the sale of this cargo at Velasco after its sale.

JOHN HALL, master of the schooner Benjamin Hale, testified that he was fifty-three years old and master mariner, and had been to sea since he was sixteen years of age in all kinds of vessels; had

been a master mariner twenty-eight years. He made a contract of charter-party with the Washburn & Moen Manufacturing Company to carry a cargo of wire from Boston to Velasco. A copy of this charter-party is hereto annexed, marked "Exhibit 7;" that he signed the bill of lading, a copy of which is hereto annexed, marked "Exhibit 4."

The schooner Benjamin Hale, in a good seaworthy condition, sailed from Boston on the thirty-first day of March, 1893; that he encountered only the ordinary perils of the sea until the fifteenth day of April, when his schooner ran ashore on Bahama banks, and he threw overboard about two hundred reels of barbed wire. The result of throwing this wire overboard was that the schooner floated and proceeded on her voyage.

On April 19, 1893, at 10.30 p. m., the schooner Benjamin Hale again ran ashore on Bird key near the Dry Tortugas. By reason of the vessel running ashore she filled with water. The pumps were sounded and thirteen feet of water was found in the stern of the vessel. The vessel was higher at the bow than at the stern; that there was not as much wire loaded in the bow as in the stern; that the crew of the schooner used the pumps, but were unable
21 to pump the water out that was in her; that a wrecking crew of four men from a wrecking schooner came on board Friday, April 21. This schooner had no appliances or steam pumps.

That on April 22 he went on board the packet which runs to Key West and stops at Dry Tortugas, and arrived in the Packet at Key West on Saturday, April 23, in the evening.

On April 24 he sent a telegram to the Washburn & Moen Manufacturing Company, a copy of which telegram was admitted in evidence and marked "Exhibit 8." At the time that he sent the telegram he thought the schooner Benjamin Hale and cargo were a total loss. He judged of the same from his experience as shipmaster, and he also consulted with another shipmaster, who thought the same. On April 24 he got some wreckers to go to the vessel, and took some pumps with them to try and save the vessel and cargo; that he went back to the place where the schooner Benjamin Hale lay in the Packet, and arrived there on Tuesday, April 25, at 11 a. m. The wreckers that were sent from Key West arrived at about the same time. All the wreckers went to work on the vessel and she was floated on April 29 at 2 p. m.; stood into Tortugas at 3 p. m.; from the time the vessel went ashore until she came off they were taking the cargo out as they could so as to get her off. When she got off she was nearly all or partly pumped out. About two hundred bales of wire were thrown overboard in order to make room for the wrecking pumps; after she was floated the schooner could not be kept free of water until a wrecking steamer came to her assistance and towed her to Key West, where she arrived on Thursday, May 4, at 12 m.; thinks about one-half of cargo was discharged on the reef, of which he thinks about thirteen hundred reels were dry; that the balance of the wire was very wet, the most of it having been immersed wholly in salt water all this time.

The noted protest and extended protest were admitted in evi-

dence without objection and marked "Exhibit 9." The said copies of the protests were at once forwarded by him to the Washburn & Moen Manufacturing Company, he is quite sure, at their request. He does not remember the date. He saw the vessel and cargo of wire while it was being discharged. The discharge was completed on Wednesday, May 10, at 8 a. m. During all of this time
22 the hold of the schooner Benjamin Hale was more or less filled with water. After the cargo was discharged, the dry cargo was placed in the warehouse, and the wet cargo was placed on the wharf, where it was exposed to the atmosphere. He did not examine the wire very closely. The galvanized wire looked well, and a portion of the other was rusted considerable. He did not notice any white powder on the galvanized, but it was not looking as bright as that which had not been wet.

He left Key West on Saturday, June 10, and at that time there had been proceedings taken by the salvors; that the vessel and cargo had been libelled by them in the United States admiralty court; that while at Key West he met the underwriters' agent, Captain Hanna, of New York, and also the local underwriter's agent, Moreno. He received a request from both of these parties to forward the wire to Velasco. He wished to abandon the cargo at Key West and not ship it forward, as he thought it was better for all concerned. He could not get a vessel to take the cargo from Velasco to Key West for ordinary freight, or for the freight that he was to receive under his charter-party; that when he left Key West Captain Hanna had gone and the cargo was still there, and no vessel had been chartered to carry the cargo forward to Velasco. He never paid any salvage on the cargo and did not employ counsel to defend the salvage case against the cargo. He went from Key West to Boston and afterwards went to the hospital, but he made no negotiations in Boston in regard to chartering any vessel to carry the wire to Velasco, and did not authorize any one to do so for him; that he signed the charter-party, but did so at the request of John S. Emery & Company. They consummated the charter that he attempted to negotiate at Key West. (This charter is admitted in evidence and marked "Exhibit 10.") It was brought to him at Marshfield by his brother.

He did not send a copy of this charter-party to the plaintiff, and the plaintiff did not request him to forward the cargo to Velasco. Captain Hanna requested to have it forwarded to Velasco; he Captain Hall, then wished to abandon it; that at the time he signed the charter-party he had abandoned the schooner Benjamin Hale; after the vessel was seized by the marshal, neither he nor any of his owners, so far as he knows, exercised any dominion over her
23 he said that the costs of repairs, together with other expenses, would be more than she was worth. He did not receive any bill of lading signed by the master of the schooner Cactus and did not undertake to deliver the cargo of the Benjamin Hale at Velasco; he authorized Taylor & Curry to charter the Cactus if they could. During the time that the cargo was in Key West, and he was there, it was pleasant most of the time. There is a claim

for general average against the cargo in behalf of the owners of the schooner Benjamin Hale, but no adjustment of the same has yet been made.

The agents of the vessel, Taylor & Curry, paid for the discharge of the cargo at Key West.

On cross-examination he testified that no part of the cargo was stored on deck. It was all in the hold; that the running ashore on the Bahamas, April 15, was in no way connected with the stranding on Tortugas the night of April 18. During the intervening time the vessel had not leaked more than ordinarily. They began taking out dry cargo April 22, and went on discharging that cargo from day to day. He thinks about two thirds of it was taken out up to the time that they got the schooner off, and that was landed at Tortugas, and the wreckers had taken it to Key West. That which was transhipped in that way at Tortugas and so sent to Key West, not on the Benjamin Hale, was mostly dry. The underwriters did not wish him to take the cargo off at Tortugas, but to go on to Key West with what cargo there was in the vessel. He received instructions in that respect from Mr. Moreno at Key West, who represented the underwriters on the vessel as well as the cargo. There was very little insurance on the vessel. The underwriters took the risk of taking the vessel to Key West without discharging it. He thinks Moreno telegraphed Poole, or Taylor & Curry,—don't know which, but think it was Moreno; he is quite positive it was Moreno telegraphed to know, if he should take the vessel to Key West with the cargo as she was, if they would assume the risk. Has no copy of the telegram. Does not know whom he telegraphed to. It was not blowing a gale of wind while the vessel was ashore, it was blowing fresh. There were probably eight or nine feet of water in the vessel at Key West, perhaps less. Her hold was thirteen feet.

He also testified that he thought Exhibit 12 was a memo-
24 randum of cargo discharged; that it was signed by him at the time, and that he supposes it must be correct. He further testified that the abbreviation dam. means damages; gal. means galvanized, and tel. means telegraph wire.

The witness also testified that Exhibit 11 was a bill for the storage of the cargo saved at Key West, and that it was signed by him. It was offered in evidence merely to show the exact amount of wire and staples, and so on, that were saved ashore at Key West on the 18th of May, 1893.

THEODORE W. GORE testified that he is, and was in 1893, an adjuster of marine averages in Boston; that he acted in behalf of Mr. Walton Hall, one of the owners of the schooner Benjamin Hale, in either May or June, 1893. He did not see Captain John Hall, but saw his brother Walton Hall; that he had an interview with Mr. Poole, representing the Reliance Marine Insurance Company, with regard to the cargo to be carried from Key West to Velasco; that he advised Mr. Poole to have nothing to do with the cargo, to leave it alone.

DANIEL N. BATES testified that he resides in Worcester, Mass.; has charge of the freight and insurance of the Washburn & Moen Manufacturing Company, and has done so for the last eight years. In 1893 he was in the same position that he holds today; that he attended to the insurance of this cargo for the company, and that he remembers the shipment of the cargo and the shipment of wire of the schooner Benjamin Hale. The premium on the same amounted to six hundred and ten dollars and was paid by the plaintiff company to the Reliance Marine Insurance Company; that the first his company heard in relation to any injury or disaster to the schooner Benjamin Hale, or her cargo, was a telegram from the captain of the schooner Benjamin Hale. The telegram marked "Exhibit 8" is admitted as evidence in this case.

He thinks it was on Monday, April 24, that he came to Boston, either that day or the next, and saw a gentleman by the name of Ogilby who was connected with Johnson & Higgins, insurance agents; that he had a conversation with him in regard to what the plaintiff should do.

As a result of that conversation he called on Mr. Poole, the defendant's agent, at his office, told him what he knew in regard to the troubles, and said that he wished to abandon the cargo to the underwriters. This was on either Monday, Tuesday or Wednesday. Mr. Poole said that he did not know anything about it, but that he had seen something in the papers, but as yet nothing official; that on a later date he consulted counsel in the case, and as a result of that interview he dictated a letter to send to Mr. Poole, in which he enclosed certain papers, among which was the bill of lading, a copy of the invoice and the protest, which had been received in the meanwhile. He wrote this letter because it was stated to him by his counsel that there was something in the Boston policy which required an abandonment in writing, and he did not have the policy in suit with him at the time. After the schooner Benjamin Hale left, he discovered that three hundred and ninety-two kegs of staples that were contained in the bill of lading were not shipped on board of her, as it did not arrive until too late. After the abandonment of the cargo by the plaintiff, it did not exercise any right of ownership over the cargo of wire, and it has never received any money on account of the sale of the said cargo. The Washburn & Moen Manufacturing Company received a letter, which is hereto annexed, marked "Exhibit 13," and which is admitted as evidence in this case.

The agent of the Washburn & Moen Manufacturing Company in Houston was instructed that the plaintiff had abandoned the cargo to the defendant company, and that he was not to receive it. The plaintiff had never had anything to do with the cargo from the time that they made the abandonment until the present time, nor did they assume any direction or control over it. He saw samples of the cargo after it arrived at Velasco. The samples did not look like wire, but looked like a mass of rust. He saw the cargo of barbed wire when it was put on board of the schooner Benjamin Hale. It was slipped down a plank and dropped in the hold, and

was then carried away by longshoremen and stowed; that barbed wire is reeled by machinery.

On cross-examination he states that these goods were consigned to the plaintiff and were not sold; that the company distrib-
26 uted them from Velasco to all parts of Texas; that Texas was a good market for wire at the period at which the wire was sold. The rusty lot of wire that he saw consisted of a sample cut from fifteen bundles of barbed wire; some of it was painted and some galvanized. He thinks he saw it about the time it was landed at Velasco, but cannot fix the exact date. This was in the autumn of 1893. It was sent him by the plaintiff's agent, George H. Cragin.

WILLIAM E. RICE, of Worcester, Mass., testified that he is, and was in 1893, president of the Washburn & Moen Manufacturing Company, the plaintiffs in this case; that he was sixty-one years of age; had been connected with the Washburn & Moen Manufacturing Company for forty years; that it is engaged in the manufacturing of all kinds of wire, and was the owner of the cargo shipped on schooner Benjamin Hale in 1893; that since April, 1893, his company has never exercised any action of ownership over the cargo of wire loaded on board the schooner Benjamin Hale. On Oct. 28, 1893, a bill of lading was sent by the Houston agency, which he at once forwarded to his counsel in Boston. The plaintiff has never received any money from any source on account of this cargo of barbed wire. There is no market for barbed wire at Key West, but Velasco, Texas, is a good place to sell all kinds of barbed wire. Galvanized wire will stand exposure to good or wet weather better than painted wire. It will also stand exposure to sea water better; that the total number of reels of barbed wire on the schooner Benjamin Hale was thirteen thousand and fifty-one. Eleven thousand seven hundred and seventy-five were galvanized barbed wire, and twelve hundred and seventy-six reels were painted barbed wire. The price of galvanized wire was then three cents per pound, and the painted two and a half cents per pound, put free on board the cars at Worcester.

Deposition of GEORGE A. CRAGIN, taken in Houston, Texas, on May 15, 1895, which is as follows:

Q. 1. What is your name, age, and place of residence?

A. George A. Cragin; age, thirty-one; residence, Houston, Texas.

Q. 2. What business are you engaged in, and for whom?

A. I am the representative of the Washburn & Moen
27 Manufacturing Company, manufacturers of wire. My headquarters are in Houston

Q. 3. What experience have you had in handling wire goods, if any, and what kind of wire goods have you had experience in handling?

A. I have had considerable experience, extending through a

period of fourteen years, in all kinds of wire, and many kinds of goods made of wire.

Q. 4. What has been the extent of your experience in this line of business, and where have you been engaged in business besides Houston, Texas?

A. I was in the same line of business in Chicago, and for about five years in San Francisco.

Q. 5. Do you know the market value of barbed wire, wire of various classes, smooth wire, rope wire, galvanized lines, annealed wire, hay ties, insulated wire and staples, in the markets of Velasco, Houston and Galveston, Texas, in August and September, 1893?

A. I do.

Q. 6. Did you examine a cargo of goods last inquired about, discharged by the schooner Cactus at Velasco?

A. I did.

Q. 7. To whom was the cargo consigned?

A. Consigned to the Washburn & Moen Manufacturing Company at Velasco.

Q. 8. When did you first see the cargo and examine it, where was it at that time, and in what condition did you find it?

A. I examined it a short time after it arrived on board the schooner Cactus. The fact of its being on the schooner prevented a very thorough examination, as only a very small portion of the cargo was exposed to view. I found the cargo that I examined to be in a decidedly damaged condition.

Q. 9. Did you make any subsequent examination of it, and if so, where and when?

A. I made several subsequent examinations after the cargo had been discharged in Velasco.

Q. 10. What was the character of the examination you made, and what was the extent?

A. I went over the cargo very carefully, and examined all of it that could be seen from any point of view. The cargo was piled in such a manner that it could not be entirely examined.

Q. 11. What do you mean by "could not be entirely examined"?

A. Large portions of the cargo consisted of barbed wire.
28 This, for instance, was six reels high, and in one body, so that a large part of the under reels could not be seen at all. I was not in Velasco when the cargo was being discharged.

Q. 12. What did you, as general representative of the Washburn & Moen Manufacturing Company, have to do with the discharging of the cargo?

A. Nothing whatever, as I had refused to receive same as representative of the company.

Q. 13. From your examination made at the time indicated above, of what did the cargo consist?

A. It consisted of one reel of wire rope, five reels of insulated wire, fifteen barrels of clothes lines, about a thousand bundles of plain wire, smooth annealed and galvanized, about two hundred and fifty kegs of staples, about five hundred bundles of hay ties, and from twelve thousand to thirteen thousand reels of barbed wire.

The last-mentioned items were as near as I could get from a careful estimate.

Q. 14. In what condition did your examination disclose the cargo generally to be?

A. The bulk of the cargo was seriously damaged.

Q. 15. Please state what you estimate the per cent. of the damage to the various items of the cargo in detail to be?

A. I found the reel of rope and clothes lines and staples, and some thirty or forty bundles of smooth wire to be in good condition, having sustained no damage, the insulated wire damaged from twenty-five to thirty per cent.; the hay ties were slightly damaged to the extent of about ten or fifteen per cent.; the balance of the smooth wire, or the larger portion thereof, was seriously damaged, some of it being utterly worthless and some of it being but slightly damaged. I estimated the damage to the entire lot of this smooth wire, exclusive of the thirty or forty bundles above referred to as being in good condition, at from sixty to sixty-five per cent. The larger portion of the barbed wire consisted of galvanized barbed wire, which was seriously damaged. I estimated the damage to this galvanized barbed wire at sixty-five per cent. of its original cost. The remainder of the barbed wire was painted barbed wire, which was so damaged as to render it worthless.

Q. 16. What do you estimate the damage in percentage of the total cargo to be?

A. At least seventy per cent.

29 Q. 17. Do you know the date that the cargo was discharged from the Cactus?

A. I cannot give the exact date, but it was about Aug. 10, 1893.

Q. 18. From your experience, what effect will the August and September weather ordinarily have upon wire of that character when it is exposed for two months, and when it was in good condition at the time it was exposed, and free from damage?

A. Ordinary weather at that season of the year would have practically no effect on galvanized and painted barbed wire, or smooth galvanized wire.

Q. 19. When the cargo was discharged where was it placed, and what part of it, if any, was exposed, and what part, if any, was under cover?

A. The galvanized and painted barbed wire and the smooth galvanized wire was placed on a rudely constructed platform resting on the ground, and was entirely exposed to the weather. The remainder of the cargo was placed in the warehouse on the docks at Velasco, and was entirely protected from the weather.

Q. 20. What do you estimate the market value of the cargo in money, in the market of Velasco, at the time it was discharged by the schooner Cactus, in the condition it was then in in Velasco?

A. It really had no market value.

Q. 21. On account of what cause?

A. For the reason that wire in the condition that this cargo was in must be sold for just what the prospective purchaser who examines such wire will give for it. It was badly damaged, and there is

no way of arriving at the market value of this kind of goods in such condition; there is no fixed relation between their intrinsic value and their market value.

Q. 22. Was there any part of the cargo discharged by the Cactus and examined by you which had no market value as wire, and if so, what part of it and how much?

A. Yes, sir; all the painted barbed wire, and a considerable portion of the plain wire, annealed and galvanized wire.

Q. 23. How long have you been representing the Washburn & Moen Manufacturing Company at Houston, Texas, as their general agent?

A. Since Feb. 1, 1893.

Q. 24. Do you recollect what the condition of the weather was at Velasco from the time the cargo was discharged until it was sold?

A. During that time I visited Velasco upon several occasions, and the weather was clear and fine upon each of these occasions. I could not say what was the condition of the weather the remainder of the time.

Q. 25. What is the distance from Velasco to Houston?

A. Sixty miles.

Q. 26. Does that represent by rail or a direct route?

A. By rail, sixty miles, and by direct route a little less.

Cross-examination:

X Q. 27. Where is the factory, the Washburn & Moen Manufacturing Company, located?

A. They are located at Worcester, Mass.

X Q. 28. Where was this wire made?

A. At Worcester, Mass.

X Q. 29. Was it ordered by you as agent, or was it made by the factory and sent to you as general agent?

A. I order all the stock that is carried at Houston or sold from this point. This particular cargo was ordered by me for stock.

X Q. 30. Was it shipped originally by the Cactus?

A. No, sir.

X Q. 31. What vessel was it shipped on?

A. The Benjamin Hale.

X Q. 32. Where did the Cactus receive it?

A. At Key West.

X Q. 33. Was that by your order?

A. No, sir.

X Q. 34. How did that come?

A. I do not know.

X Q. 35. When were you first notified that the cargo had reached Velasco, and how, if you know?

A. I received a notification by mail from the commander of the Cactus.

X Q. 36. What did you do when you received that notice?

A. Paid no attention to it, so far as the commander of the Cactus was concerned, but subsequently went to Velasco and examined the

cargo through the courtesy of the captain, and reported on its condition to the home office.

X Q. 37. Have you got a copy of that report?

A. I cannot say.

X Q. 38. Can you ascertain by investigation whether or not you have a copy of that report?

A. Yes, sir.

X Q. 39. I would ask, if you have a copy of that report with you, you would append it to this answer and mark it for identification, and make it a part of the answer. (*Attached, marked* "Exhibit B.")

X Q. 40. Have you the original report in your possession?

A. No, sir.

X Q. 41. Where is it?

A. I do not know.

X Q. 42. What became of it?

A. I sent it to the home office.

X Q. 43. Is it not now in your possession or accessible to you?

A. No, sir.

X Q. 44. Did you receive an answer from the home office when you made that report, instructing you what to do with this cargo as agent of the company?

A. Yes, sir.

X Q. 45. Was that answer in writing?

A. It was.

X Q. 46. Have you got that answer in your possession?

A. I do not know.

X Q. 47. Can you know by examining your papers?

A. Yes, sir.

X Q. 48. I now request that you append the original answer, if in your possession, from your company, annex it, marking it for identification and making it a part of your answer. (*Attached, marked* "Exhibit C.")

X Q. 49. What did you do when you received that answer from your home company?

A. I did nothing with it whatever.

X Q. 50. When you received instructions from the home company, whatever they were, with reference to this cargo, what action did you take on the instruction?

A. I complied with them and took no action whatever.

X Q. 51. Were your instructions from the company to take no action whatever?

A. My remembrance of the instructions is that I was to take no action in the matter.

X Q. 52. And this you obeyed?

A. I did.

X Q. 53. Who was the owner of that cargo?

A. Washburn & Moen Manufacturing Company owned the cargo of wire when it was loaded at Boston.

X Q. 54. You state that it was consigned to you for stock?

A. It was consigned to their order, to be received by me as their agent.

32 X Q. 55. What disposition were you to make of it?

A. Sell it.

X Q. 56. Sell it from where?

A. From Velasco or Houston.

X Q. 57. What sort of a market is Velasco for wire in quantities of that size, the size of this cargo?

A. There is practically no difference between Velasco and Houston, it's simply a mere rate of freight. The only difference would be the difference in the rate of freight from Velasco to Houston and to some points the rate from Velasco would be the same as from Houston.

X Q. 58. What facilities had they in Velasco, in August and September 1893, for receiving and storing the cargo, as much as that brought in on the Cactus, if it is within your knowledge?

A. The facilities for handling a large cargo of that kind are excellent. They had storage capacity for all or a good portion of it but this storage was being used to a large extent in the handling of other and more perishable freight.

X Q. 59. Did that monopolize the space and prevent the possibility of storing a cargo as large as that of the Cactus?

A. All of the goods on the Cactus, subject to damage from the elements, were placed in a well-protected enclosure; the balance were placed in the open air and were not protected from the elements or weather.

X Q. 60. At whose instance was this cargo stored, if you know and who made arrangements for the storage?

A. I do not know.

X Q. 61. Did you bid on that cargo yourself for your company?

A. No, sir.

X Q. 62. Did you procure any person to bid?

A. No, sir.

X Q. 63. Were you present at the sale?

A. No, sir.

X Q. 64. Of your own personal knowledge, you do not know what the cargo brought, nor how many bidders were present at the sale?

A. No, sir.

X Q. 65. Did you make any effort, as agent of the Washburn & Moen Manufacturing Company, to protect that cargo and the owner of that cargo from loss at the time of its arrival in Velasco?

A. No, sir.

X Q. 66. What was the value of that cargo if in good order after delivery at Velasco?

A. In quantity originally shipped, about forty-eight thousand dollars.

33 X Q. 67. Did you receive a bill of lading and invoice for that cargo as agent of the company?

A. I received a bill of lading and a memorandum invoice. In explanation of that I state that the company does not bill any goods

consigned to this agency in dollars and cents, simply in quantity and weight.

X Q. 68. Did you compare the memorandum invoice that you received from your company with the memorandum you received from Velasco?

A. I did not.

X Q. 69. You were present at the time of the testimony of Mr. Blum before Mr. Houk in Galveston, and also at the taking of the testimony of Mr. Cortes, before Mr. Tackaberry, and heard the questions propounded to them and the answers which they gave?

A. Yes, sir; I was.

Direct examination resumed:

Q. 70. In answer to the question on cross-examination you stated that you took no action with reference to the cargo of the Cactus when it landed at Velasco, or afterwards, in the interest of the company you represent. Explain why you took no such action.

A. I did nothing myself, so far as the Cactus or her commander was concerned, but as I have already stated, I did subsequently make several examinations of this cargo.

Q. 71. Did you know anything with reference to abandonment of the cargo by the company before it reached Velasco?

A. As I remember, I was informed of an abandonment.

Q. 72. In acting as you did in reference to the cargo, after it arrived at Velasco, what influence, if any, did your knowledge of the abandonment have upon your conduct in the matter?

A. None whatever. I sought and obtained instructions and carried them out.

Q. 73. Then what was influencing you in the matter?

A. The fact of this cargo of wire arriving in a vessel other than the one in which it originally left Boston prompted me to seek instructions in the premises, upon which I acted.

84 EXHIBIT A.

VELASCO 14. 10.30 A. 7, 14, 1893.

Washburn-Moen Mfg. Co., Ho.:

Schooner Cactus here, cargo wire consigned to you now ready to discharge.

L. S. WILEY.

EXHIBIT B.

VELASCO, *July 15th*, 1893.

D. N. Bates, care Washburn & Moen Mfg. Co., Worcester, Mass.:

Have examined Cactus cargo, emerald and staples all right, galvanized embattle badly damaged, painted worthless. Captain demands we accept immediately, reported ready discharge yesterday, fifty dollars daily demurrage after five days. Two hundred dollars Key West demurrage freight at two and a quarter gross ton and unloading charges against the cargo. Telegraph here definite instructions quick.

GEO. A. CRAGIN, *Ag't.*

Paid.

EXHIBIT C.

WORCESTER, MASS., 7, 19, 1893.

Geo. A. Cragin, agent W. & M. Mfg. Co., Ho.:

We abandoned cargo at Key West and must contin-e abandonment under no circumstances agree receive cargo whenever wherever cargo discharged. You must have thoroughly competent expert examine so he can be witness for us. We have nothing to do Cactus captain sailing under insurance instructions.

WASHBURN & MOEN MFG. CO.

The plaintiff then offered as evidence a certified copy of the judgment and other proceedings in the cause of salvage against the schooner Benjamin Hale, said suit having been brought in the United States district court for the southern district of Florida, it being agreed that the libels and other papers should be admitted as evidence of the facts contained therein as though the same was taken by depositions of the parties or by other formal proof; same following, and marked "Exhibit 15."

35 EXHIBIT 15.

District Court of the United States, Southern District of Florida.
In Admiralty.

REUBEN IRELAND & JAMES ST. CLAIR ET AL.
v.
THE AM. SCHR. "BENJAMIN HALE" & CARGO. } Salvage.

Be it remembered that on the sixth day of May, A. D. 1893, came Reuben Ireland *et al.* by their proctor, W. C. Maloney, Esq., and filed with the clerk of the said court, their libel against the Sch. Benjamin Hale, her tackle, apparel, furniture and cargo, in the words and figures following, to wit:

District Court of the United States, Southern District of Florida.
In Admiralty.

REUBEN IRELAND ET AL.
v.
SCHR. BENJAMIN HALE AND CARGO.

To the Honorable Jas. W. Locke, judge of the district court of the United States in and for the southern district of Florida:

The libel of Reuben Ireland, master of the steam wrecking tug Clyde, of the burden of 48 tons, and a crew of nine men, who libels for himself, his owners and crew, against The American Schr. Benjamin Hale, her tackle, apparel, furniture and cargo, consisting of 10,443 bundles of barbed-wire fencing, now lying and being in the port and harbor of Key West, and within the jurisdiction of this

honorable court, and against all persons intervening for their interest therein, in a cause of salvage, civil and maritime, alleges as follows:

First. The libellant says that on his arrival at this port of Key West on Sunday, the 30th day of April, he learned that two
36 (2) vessels were ashore at Tortugas, he immediately steamed out of port at 6.30 a. m. next morning. Arrived alongside the Schr. Benjamin Hale. He found the said schooner in the possession of salvors who had taken out a small portion of her cargo and had floated her and was anchored in six fathoms of water.

Second. The salvors, through wrecking master, Jas. St. Clair, requested libellant to come alongside immediately as the schooner was in a sinking condition and that they were about to put her back upon the reef; that she had about eight feet of water in her hold.

Third. The tug Clyde was immediately put alongside the said schooner, and her wrecking pump's suction was put in the schooner's hold and pumps started, then steam was furnished from the tug's boiler to a pump already on board the schooner which had been placed there by original salvors and where boiler was useless, and pumped until ten o'clock a. m. when the boiler running another pump, called the centrifugal, belonging to original salvors having been put in order with the assistance of the tug's engineer was put to work and the three pumps working together succeeded in freeing the schooner of water at 1.10 p. m.

Fourth. Libellants then hove up anchor and took the schooner in tow with the Cora astern of her, the schooner having no rudder hung, and took her into Tortugas harbor and placed her alongside the dock—again started pumps and kept the schooner free.

Fifth. On Tuesday morning sent a submarine diver under the schooner who worked all day Tuesday, and the following day, Wednesday, until about 11 o'clock a. m., making such temporary repairs as to enable the libellant to tow the schooner up to this port.

Sixth. On Wednesday at 6.30 p. m. got under way with schooner in tow, her rudder having been fixed, and started for Key West, and about 9 o'clock p. m., the boiler of the steam pump, already mentioned as being useless (having been temporarily repaired while at Tortugas) blew a plug out the tube and was again rendered useless—the schooner being anchored at the time for the purpose of ascertaining if the boiler aforesaid could be relied upon for the purpose of furnishing steam for the pump. The tug again connected her pipes with the pump and using her own pump by inserting
37 its suction into the schooner's hold and succeeded in freeing the schooner of water at about daylight Thursday morning.

Seventh. At daylight the weather being fine with light westerly winds, again started for Key West, and when near Rebecca shoal again placed the tug alongside the schooner and again freed her from water, and then proceeded until when off Boca Grande again put the tug alongside and again freed the sch. from water, again proceeded for Key West where we arrived at 12 o'clock Friday night.

Eighth. That during the passage from Tortugas to Key West the original salvors were running the centrifugal pump and two hand pumps on board the schooner and they rendered such assistance during the entire service as they were able to render.

Ninth. Libellants allege that they have saved the said schooner from total loss and the cargo on board from the expense and labor of having to be lightered to this port; that they are still employed working at the said schooner without any assistance from the original salvors and will be so employed until the said schooner is discharged.

Tenth. That they are unable to form any idea of the value of the said schooner or of her cargo.

Wherefore, the libellants pray that process in due form of law may issue against the said schooner and her cargo; that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court will be pleased to decree to them a reasonable and proper salvage according to the merits of their service, and that the said vessel and cargo may be condemned and sold if necessary to pay the said salvage, with the costs, charges and expenses, and for such other and further relief as in law and justice they may be entitled to receive.

REUBEN IRELAND, *Capt.*
W. C. MALONEY, *Proctor.*

Sworn to and subscribed before me this 6th day of May, A. D. 1895.

CHAS. J. CURRY, *N. P.*

Whereupon the following order was made:

38 Ordered that attachment and motion issue as prayed, returnable Wednesday, May 17, 1893, at 10.30 a. m.
May 6, 1893.

JAS. W. LOCKE, *Judge.*

Whereupon attachment was issued to the marshal of the said district commanding him forthwith to seize and take into his custody the said Amer. Schr. Benjamin Hale and cargo wherever found in his precinct, and the same to safely keep until further order of this court, which attachment was by him afterwards returned duly executed and with his return thereon endorsed is on file in the said clerk's office.

Also monition was issued to the said marshal commanding him forthwith to cite and admonish whomsoever having or pretending to have any right, title, claim or interest in or to the said Amer. Schr. Benjamin Hale and cargo to be before an admiralty session of the said court at the court-rooms in Key West on the 17th day of May, A. D. 1893, at *01* o'clock a. m. to answer the said libel and to show cause, if any they have, why decree should not be pronounced as prayed, which monition was by him afterwards returned duly executed and with his return thereon endorsed is on file in the said clerk's office.

And afterwards, to wit, on the tenth day of May, A. D. 1893, came James St. Clair *et al.* by their proctor, G. Bowne Patterson, Esq., and filed with the clerk of the said court their libel against the said Am. Schr. Benjamin Hale, her tackle, apparel, furniture and cargo, in the words and figures following, to wit:—

SOUTHERN DISTRICT OF FLORIDA, }
In Admiralty. }

To the Honorable Jas. W. Locke, judge of the district court of the United States in and for the southern district of Florida:

The libel of James St. Clair, master of the licensed wrecking Schr. Nonpareil, of the burthen of 42 tons and a crew of 12 men; of William H. Shaw, master of the licensed wrecking schooner Foam of the burthen of 16 tons and a crew of nine men; of Thomas B. Sweeting, master of the licensed wrecking Schr. Magnolia of the burthen of 44 tons and a crew of 11 men; of William Blatch-
39 ford, master of the licensed wrecking Schr. Golden Hind of the burthen of 70 tons and a crew of 9 men; of Thomas Pent, master of the licensed wrecking Schr. Cora of the burthen of 88 tons and a crew of 14 men, who libel for themselves, owners and crews, and for all others interested with them, against The American Schooner Benjamin Hale, her tackle, apparel, furniture and cargo, now lying and being in the port and harbor of Key West, and within the jurisdiction of this honorable court, and against all persons intervening for their interest therein — a cause of salvage civil and maritime, alleges as follows:

First. Libellant St. Clair says that on Friday, April 21st, 1893, while on his way with Schr. Nonpareil to Tortugas he saw a vessel ashore on the Bird Key shoal, immediately ran for her and upon boarding her at about 12.30 p. m. found the master and second mate on board, the crew having left her and were ashore at Tortugas, the vessel was partly stripped, and most of her stores and materials had been taken ashore at Tortugas; learned that the master and all of the crew had abandoned her, and that the master and the second mate had returned to her upon the approach of the Nonpareil; that she was the schooner Benjamin Hale of Newburyport from Boston bound to Velasco, Texas, with a cargo of barbed and other wire; that she went ashore the Tuesday previous, and that before going ashore she drew about fifteen and one-half feet of water, and that she was then bilged.

Second. The schooner lay ashore on Bird Key shoal, heading about west ½ south; offered his services to the master and they were accepted. The sea was so rough that it was impossible to do anything with the vessel at that time; went into the harbor of Tortugas taking the captain with him; found the schooner Foam of the Sea at Tortugas and formed a consort with her, and on the next morning at early daylight the libellant in his schooner Nonpareil again went to the wreck. The schooner Foam of the Sea took on board the materials and stores which had been taken from the wreck to Tortugas by the wreck's crew, and with the captain and

crew of the wreck on board proceeded for Key West; libellant, St. Clair, on boarding the wreck, opened the hatches and sounded the pumps and found she had 12½ feet of water in her hold;
40 manned the pumps with the crew of the Nonpareil and after pumping one hour could not lower the water, and the pumps throwing sand, concluded that the vessel was bilged; found the vessel's rudder unshipped and hanging, and the rudder casing stove in, a heavy swell rolling under the vessel's stern at the time. As soon as the sea moderated at about 2 p. m. at high water, libellant St. Clair sounded around the vessel and found under her stem 15½ feet at her fore chain, at her main chain 15 feet, at her mizzen chain 15½ feet, and at her stern 18½ feet, and the water gradually deepening from her stern out; put all hands of the crew of the Nonpareil to work stripping the vessel of her sails and running rigging, then discharging cargo from the vessel's hold on board the Nonpareil, and by 8 o'clock p. m. had the Nonpareil loaded with 300 rolls of wire, and with the vessel's sails and rigging went to Tortugas and discharged the same.

Third. The next morning, Sunday, the 23rd of April, at early daylight the Nonpareil returned to the wreck, while the Nonpareil's crew were taking out cargo, libellant St. Clair went in a small boat around the wreck making a thorough examination of her condition, and found two butts opened on the starboard side, at the main rigging, and the end of one of her planks under her stern splintered, the crew being employed all day discharging cargo on board the Nonpareil; knocked off at night.

Fourth. The next morning, Monday, April 24th, after libellant, St. Clair, had caulked up such leaks as could be gotten at, at 6 o'clock a. m., he put all hands of the crew of the Nonpareil at the pumps of the wreck and pumped until 2.45 p. m., reducing the water in the hold at the rate of 4½ inches per hour; satisfied that the vessel was not bilged, and the crew being worn out from pumping, concluded to stop the pumps until assistance could arrive from Key West, and went to work discharging cargo on board the Nonpareil as the vessel would have to be lightened if she was floated; loaded the Nonpareil that night and went to Tortugas and discharged the cargo a part on deck that night at midnight, and the balance of the deck-load next morning.

Fifth. The next morning, Tuesday, April 25th, at early daylight, returned in a small boat to the wreck and found alongside of her the schooners Magnolia and Golden Hind, which had ar-
41 rived early that morning from Key West; formed a second consortship with these vessels and their crews, manned the ship's pumps with all hands we could get on them, and after pumping for some time found that we were materially reducing the water in the wreck's hold. The schooner Cora with steam pumps on board from Key West hove in sight, stopped the pumps to wait her arrival, and during the interval, discharged cargo from the forward hatch of the wreck to lighten her; discharged on board of the schooner Magnolia about 450 rolls of wire. The schooner Cora arrived at the wreck at about 9 a. m. and was taken into the second

consortship. Before taking the steam pump from the Cora on board the wreck, placed the wreck's best bower anchor on board the schooner Magnolia with 75 fathoms of 7-inch hawser from Cora, and 60 fathoms of 7-inch hawser from the schooner Nonpareil. The schooner Foam of the Sea having arrived from Key West with the master of the wreck on board, anchored her about 250 fathoms from the stern of the wreck and hauled schooner Magnolia out to her and let go anchor in about 6½ fathoms of water, *led* hawser made fast to anchor through starboard chock of stern of wreck, put luff tackle on it and ran it to the capstan of the wreck and hove strains on the same; while anchor was being run Schr. Cora came alongside of the wreck, and as soon as possible had the Cora's Blake pump hoisted out and placed upon the deck of the wreck and the Cora placed in a position to furnish steam to connect with her pump from a boiler on Cora's deck. Everything being in readiness, started the steam pump, and after one hour's pumping, lowered the water in the ship's hold about 7½ inches, the sea then becoming so rough Cora was forced to disconnect steam pump and haul off from the wreck as was also the schooner Golden Hind with 285 rolls of wire from main hatch of wreck. This was about 10.15 p. m. The weather not permitting, nothing further was done that night.

Sixth. The next morning, Wednesday, April 26, the weather and sea somewhat moderating, hauled the schooner Magnolia alongside and loaded her out of forward hatch of wreck and dispatched her for Key West with about 968 rolls of barbed and other wire. The Foam of the Sea was then hauled alongside at about 2.30 p. m. and by about 5.40 p. m. loaded with about 64 bundles of barbed
42 and 390 bundles of long wire and dispatched her for Key West. During this day brought another steam pump from the Cora and placed it upon the wreck, preparing after vessel was sufficiently lightened to pump her out. Towards evening, the wind freshened and the sea became so boisterous that no more work could be done that day.

Seventh. The next morning, Thursday, April 27th, at 6 o'clock the weather having moderated, the schooner Cora came alongside of the wreck and commenced taking the wire from the main hatch of the wreck, this wire being taken out of the main hatch in order to place the suction pipe of pump lower in the hold. At 10.45 connected steam with centrifugal pump and commenced with the result that the water in the wreck's hold was lowered at the rate of about 1 foot an hour. At 2 p. m. the boiler gave out and stopped pumping; repaired boiler about 5 p. m. and resumed pumping, and lowered the water in the hold as far as the suction pipe would permit, to about 4 feet. During this entire time, the libellants were engaged in putting cargo on board of the Cora which continued until midnight when they had placed on board of her about 500 rolls.

Eighth. The next morning, Friday, April 28, at 6 o'clock commenced clearing cargo away in main hatch of wreck putting it on board the Cora so as to put centrifugal pump between decks; made a jettison of about one ton of wire that was rusted and worthless in

order to get space for suction of pump, it being too rough for any vessel to come alongside at that time, and at about 2.30 p. m. had a platform built and a hole bored for discharge of pump through vessel's side, and placed pump between decks, leaving boiler on deck of the wreck, which had been transferred from the Cora and which was being put in order so that the pumps might be resumed. The work of discharging the cargo on board of the Cora from the wreck continued up to dark when she had placed on board of her six hundred and forty rolls of wire. It being considered advisable that another anchor be run before the work of freeing the wreck was resumed, libellant, St. Clair, in the Nonpareil went to Tortugas for chain, none being available on board of the wreck at the time, obtained 30 fathoms and came back to the wreck; took two spare anchors from the wreck on board of the Nonpareil attached
43 them to the 30 fathoms of chain and made this fast to 80 fathoms of hawser belonging to the Cora and the wreck, then carried them straight out astern of the wreck about 110 fathoms and let them go so that one anchor backed the other, then led hawser through port stern chock of the wreck and put a luff tackle on it and ran it to the winch and hove it taut. At about 11 p. m. got boiler in working order and connected steam with pump between decks and started same and kept pump going on all night and gained on water in the hold considerably.

Ninth. The next morning, Saturday, April 29th, considered the vessel sufficiently lightened and proceeded to get everything ready to heave the vessel off at high water that evening; kept both steam pumps and hand pumps going continually. At 5 p. m. the schooner Magnolia arrived from Key West with a spare boiler, 20 barrels of coal and stores for wreckers; came alongside and discharged the same on board the wreck. At between 8 and 9 p. m. manned the capstan, winch and falls, and started to heave the wreck astern, a strong gale blowing from the eastward and a heavy sea, pumps kept going. At 10.30 p. m. had moved wreck astern 30 feet, sea breaking continually under and over her stern, and by 1 a. m., April 30th, hove the wreck into 3 fathoms of water and to within about 40 fathoms on starboard and 45 on port anchors; kept the pumps going continually, both steam and hand.

At about 2 a. m., boiler to steam pumps broke down, all hands then manned the hand pumps until boiler to steam pumps was repaired; succeeded in getting boiler to steam pumps started at about 10 a. m., then ran hawser from wreck to Schr. Golden Hind, and attached to hawser by which Golden Hind was riding, and hove wreck out into about 14 fathoms of water and let go her port bow anchor; got steam on spare boiler by 11 a. m., vessel leaking considerably, but pumps gaining on water in hold; at 10 p. m. one of the boilers gave out and water commenced to gain on us in vessel's hold; then manned hand pumps and kept them going with one steam pump up to May 1st, at about 1 a. m., when succeeded in getting steam on the other boiler and started the other pump; kept both pumps going, but one boiler being in bad condition, could

not properly feed the pumps, and about 6 a. m. found the
44 water slowly gaining on us in the hold; and, after consultation with Captains Pent, Sweeting and St. Clair, decided to let the vessel drop into shoaler water, and slacked away chain until she rested lightly on the bottom. About this time sighted a steamboat coming towards us which proved to be the tug Clyde; immediately upon sighting the steamer hove the wreck out into deep water to her anchor which took about ten minutes. As soon as the steamer came alongside, libellant St. Clair requested the tug's agent to put his pumps aboard which he did with the assistance of the libellant. The tug then connected steam with this pump and the Blake pump when they both started to work. This was at 7 a. m., and at about 1 p. m. gained 35 inches, then after pumping down about 5 inches more hove up the wreck's anchor, and proceeded in tow of the tug to Tortugas where we arrived at 3.50 p. m. Both pumps were kept going all night and the tug lay alongside to supply them with steam.

Tenth. The next morning, Tuesday, May 2nd, the tug supplying steam to pumps when necessary diver off Clyde went down under the wreck's bottom and reported it badly chafed. The Nonpareil was then dispatched to Key West for coal and another boiler, with wreck's captain.

Eleventh. The next morning, May 3rd, the diver from tug went down under wreck and did some patching, but did not stop the leaks; pumps kept going all the time; bent sails on the wreck and got her ready to leave on return of Nonpareil with boiler and coal, but afterwards concluded as the weather was good, with light westerly and northerly winds to proceed at once for Key West; started from Tortugas with wreck in tow of the Clyde about dark the same day; went outside and came to anchor when the engineer had another boiler repaired, but same would not last; kept two steam pumps going all night by steam from tug.

Twelfth. The next morning, May the 4th, again we got under way in tow of the tug for Key West all hands manning deck, deck pumps and one steam pump going all the time. At about 10 a. m. tug Clyde came alongside and connected her boiler with the pumps,
and pumps were again started and after water was consider-
45 ably reduced in wreck's hold, tug again took wreck in tow, one steam pump still working on the wreck as well as hand pumps. At about 7 p. m. tug Clyde again came alongside as before when wreck again proceeded in tow of tug and at about 12 p. m. arrived at Key West, and came to anchor in harbor; tugboat continued at work all night supplying steam to steam pumps which were kept going all night. The next morning, Friday, May 5th, the wreck was docked and master and consignee took charge.

Thirteenth. Libellants say that the several consortships with the list of vessels and crew hereinbefore referred to are hereto annexed as a part of this libel.

Fourteenth. That by their combined efforts, together with the assistance of the steamtug Clyde (which was not joined in this libel for the reason that your libellants are informed that the master and

owners of the said tug have or intend to file a separate libel in this cause against the said schooner Benjamin Hale and cargo for salvage services), they have saved the said schooner and cargo from loss; that the labor performed by them in such services was skilful and arduous, and attended with great risk to libellants and to their vessels.

Fifteenth. That your libellants have no knowledge of the value of the said schooner Benjamin Hale and cargo, and they pray that the same may be appraised by competent appraisers appointed by and under the authority of this honorable court.

Sixteenth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, they pray that process in due form of law according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said schooner Benjamin Hale her tackle, apparel, furniture and cargo, and that all persons having or pretending to have any interest therein may be cited to appear and answer under oath all and singular the matters aforesaid, and that this honorable court will be pleased to decree unto them a reasonable and proper salvage compensation, and that the said vessel and cargo may be condemned and sold if necessary to pay the said salvage with the costs, charges and expenses,
46 and that libellants may have such other and further relief in the premises as in law and justice they may be entitled to receive.

JAMES ST. CLAIR,
Master of Nonpareil.

G. BOWNE PATTERSON,
Proctor for Libellants.

Sworn to and subscribed before me this 10th day of May, A. D. 1893.

E. O. LOCKE, *Clerk.*

Whereupon the following order was made:

Let attachment and monition issue as prayed, returnable Wednesday, 17th of May, 1893.

JAMES W. LOCKE, *Judge.*

Whereupon attachment was issued to the marshal of the said district commanding him forthwith to seize and take into his custody the said American schooner Benjamin Hale and cargo wherever the same should be found in his precinct, and the same to safely keep until further order of this court, which attachment was by him afterwards returned duly executed and with his return thereon endorsed is on file in the said clerk's office; also monition was issued to the said marshal commanding him forthwith to cite and admonish all persons whomsoever having or pretending to have any right, title, claim or interest in or to the said vessel and cargo to be and appear before an admiralty session of the said court at its court-rooms in Key West, Fla., on the 17th day of May, A. D. 1893, at 10 o'clock

a. m. to answer the said libel, and to show cause, if any they have, why decree should not be pronounced as prayed, which monition was by him afterwards returned duly executed and with his return thereon endorsed is on file in the clerk's office.

And afterwards, to wit, on the 12th day of May A. D. 1893, came John Hall, master of the said schooner Benjamin Hale by his proctor, G. W. Allen, and filed with the clerk of the said court his claim to said schooner Benjamin Hale and cargo, in the words and figures following, to wit:

47 District Court of the United States, Southern District of Florida. In Admiralty.

REUBEN IRELAND
vs.
SCHR. BENJ. HALE & CARGO. } Salvage.

JAMES ST. CLAIR
vs.
SCHR. BENJAMIN HALE & CARGO. } Salvage.

And now comes John Hall and says that he is the master of the schooner Benjamin Hale, and as such is the lawful bailee of the said schooner and cargo, and he claims the same for the respective owners thereof.

JOHN HALL.

GEO. W. ALLEN, *Proctor.*

Sworn to and subscribed before me this May 12th, 1893.
E. O. LOCKE, *Clerk.*

And on the same day came the master aforesaid by his proctor aforesaid and filed his answer to both of the above-entitled libels, in the words and figures following, to wit:

District Court of the United States, Southern District of Florida. In Admiralty.

JAMES ST. CLAIR ET AL.
vs.
THE SCHOONER BENJAMIN HALE & CARGO. } Salvage.

To the Honorable James W. Locke, judge of said court:

The answer of John Hall, master of the said schooner, to the libel of James St. Clair *et al.* and also to the libel of Reuben Ireland
48 (both cases having been consolidated and made one by order of this honorable court), against the said schooner and cargo, alleges as follows:

First. This respondent in answer to the first article in the libel of James St. Clair *et al.*, says that the allegations therein contained are true and he admits the same.

Second. To the second article of the said libel he says that the allegations therein contained are true, and he admits the same as far as they refer to his accepting the services of the libellant, and he, respondent, leaving with his crew on the schooner Foam of the Sea for Key West; as to the remainder of the said article he neither admits nor denies the same, as he was not present, having left for Key West to consult the agent of underwriters, and to get further assistance.

Third. To the third article he says that he neither admits nor denies the allegations therein contained.

Fourth. To the fourth article he says that he neither admits nor denies the same.

Fifth. To the fifth article he says that the allegations therein are true, and he admits the same.

Sixth. To the sixth, seventh, eighth, ninth and tenth articles he says that the allegations therein contained are true, and he admits the same, except that he denies that it was blowing a gale.

Seventh. To the eleventh, twelfth and thirteenth articles he says that he neither admits nor denies the same having again returned to Key West to consult agent of underwriters in regard to having vessel and cargo brought into this port.

Eighth. To the fourteenth article he says that he admits the allegations therein contained so far as they refer to the faithful work done by the libellants, but denies that this work was attended with great risk to libellants and their vessels.

And for answer to the several articles contained in the libel of Reuben Ireland, your respondent says that he was in Key West when the alleged services were performed, and neither admits nor denies the same.

Wherefore, respondent prays the court to restore the said
49 ship and cargo to him upon the payment of a reasonable salvage, and for such other relief in the premises as is right and just.

JOHN HALL.

GEO. W. ALLEN,
Proctor for Respondent.

Sworn to and subscribed before me, May 12, 1893.
E. O. LOCKE, *Clerk.*

And on the 15th day of May, 1893, the following order was made, to wit:

Ordered that these cases be joined and heard together, and that Jno. J. Philbrick, Jno. W. Sawyer and Jno. Williams be and are hereby appointed to appraise the value of the said vessel and cargo and report thereon.

JAS. W. LOCKE, *Judge.*

On the 16th day of May, 1893, the said appraisers filed with the clerk of the said court their report of appraisement in the words and figures following, to wit:

KEY WEST, FLA., *May* 17, 1893.

To the Hon. Jas. W. Locke, judge of the U. S. district court, southern district of Florida.

SIR: Having been appointed appraisers by your honorable court on Schr. Benjamin Hale as she now lies, and her cargo landed at this place, we herewith respectfully make the following report:

Total value of vessel and cargo, 33,728.60.

And afterwards, to wit: on the *the* 16th day of May, A. D. 1893, this cause came on to be heard before the said court.

Present: Hon. Jas. W. Locke, judge; W. C. Maloney, proctor aforesaid, appearing for libellant Reuben Ireland, and G. Bowne Patterson, Esq., proctor aforesaid, appearing for libellants, James St. Clair *et al.*, and Geo. W. Allen, Esq., appearing for the respondent in both cases; and the cause is heard upon the libels and the answer and the testimony of witnesses duly sworn, viz: For libellants Jas. St. Clair, Chas. J. Curry, P. T. Knight, and for respondent Jno. Hall, and Thomas C. Pent, and the premises are argued by the said counsel and submitted.

And afterwards, to wit, on the 17th day of May, 1893, the parties herein being present, it is ordered, adjudged and decreed as follows, to wit:

District Court of the United States, Southern District of Florida.
In Admiralty.

REUBEN IRELAND ET AL. and JAMES ST. CLAIR ET AL. *vs.* THE AMER. SCHR. BENJ. HALE & CARGO. } Salvage.

This cause having been fully heard and the court being duly advised in the premises, and the saved property having been appraised by a board of appraisers appointed by the court at $33,728.60, the vessel at $8,000, and the cargo at..... ..... $25,728.60

286.20

$26,014.80

and cargo to the value of $286.20 having been brought in since, it is hereby ordered, adjudged and decreed that the entire service of all libellants be considered as one salvage service, and that they have received and recovered for the entire service rendered by them or any of them to the said property in the saving and preservation thereof, the sum of 25 % of the net value thereof, found by deducting from the said appraised value the costs, expenses and charges incurred in the care and preservation of the said property, together with the costs herein incurred, to be approved and allowed by the court, and that upon the payment of the said amount of salvage together with all the costs, charges, expenses and disbursements incurred on account of this disaster, the marshal surrender and restore to the claimant herein the said property for the benefit of the true

and lawful owners thereof; and it is further ordered that all
51 questions of the division and the distribution of the said salvage be held to await the further order herein.

And it is further provided that in event such salvage is not paid and any of such property is necessarily sold to pay the same, the proceeds so arising shall be taken and considered as the actual value instead of the value determined by the appraisement.

JAS. W. LOCKE, *Judge.*

And afterwards, to wit, on the 25th day of May, 1893, the costs, charges and expenses, and the questions of distribution herein having been considered, the parties herein being present, it was ordered, adjudged and decreed as follows, to wit:

District Court of the United States, Southern District of Florida
In Admiralty.

JAMES ST. CLAIR and REUBEN IRELAND ET AL.
vs.
AM. SCHR. BENJ. HALE & CARGO. } Salvage.

This cause having been fully heard and an interlocutory decree having been pronounced herein, and all matters concerning the determination of values and salvage having been duly considered, it is hereby ordered, adjudged and decreed that the salvors have, receive and recover for their services as alleged and proven from the owners of the said cargo five thousand, eight hundred and fifty ($5,850) dollars, and from the owners of the said vessel one thousand eight hundred dollars ($1,800), and it appearing that the vessel will not be able to carry the cargo forward, but that the interests will be separated here, it is ordered that upon the payment of said salvage awarded against either interest herein, vessel or cargo, by the claimant thereof, together with the costs, expenses and charges justly chargeable to that interest, the property be restored and delivered to the claimant for the benefit of the true and lawful owners thereof.

And it is further ordered, adjudged and decreed that from
52 the salvage upon said cargo there be first paid the first consort, consisting of the schooners Nonpareil and Foam of the Sea, and crews, as salvage upon cargo saved before the arrival of any other vessel, $460.40; to the second consort, consisting of all vessels rendering service before the arrival of the steamtug Clyde, for salvage upon cargo saved by them, $724.60; to the owners of the steamtug Clyde and Schr. Cora for the amount of expenses incurred and paid by them, pumping after the arrival of the schr. in the harbor, $530.84; for the use of the pumps and supervision of them for that time, $150; these amounts to be divided between the owners of the Clyde and the Cora according to their respective interests; to the owners of the Cora and pumps on board her for the use of said pumps while at Tortugas $200; to the submarine diver, $120; to the owners of the Clyde and crew of that vessel, to be divided two-thirds to the vessel and one-third to the crew, $600, the

residue of the salvage from said cargo after the payment of such allowances to the vessels for supplies furnished or damages suffered as may be allowed according to the standing rules of court among the vessels and crews of the second consort; and it further appearing that in all probability the salvage herein decreed on the vessel will not be paid, but that the vessel will necessarily be sold to pay the same, it is ordered that 25 % of the proceeds of the said vessel, her tackle, apparel and furniture and stores, after the payment of the just and proper charges, be considered as the salvage on the vessel, and that the steamer Clyde, her owners and crew have, receive and recover three-fourths thereof, to be divided ¾ to the tug and ¼ to the crew, and the remaining ¼ to be divided among the vessels of the second consort.

And it is further ordered that if the said salvage is not paid within ten days, the clerk issue an order of sale and the marshal proceed to advertise and sell the property and bring the process into court.

JAMES W. LOCKE, *Judge.*

May 25, 1893.

And afterwards, to wit, on May 27th, the clerk filed his statement as follows:

Total from cargo	$9,393.15
Due from vessel	2,355.89

53 And the said statements being approved, warrants of collection and restitution are issued to the marshal.

And on June 2nd, the representatives of the cargo having paid into the registry of the court $9,393.15, the said cargo is released. *Vend. ex.* is issued against vessel upon default.

And the costs are paid as appears by the bills annexed.

KEY WEST, FLA., *May* 10, 1893.

To Messrs. John Williams, master mariner; C. W. Bethel, master shipwright, and John W. Sawyer, merchant.

GENTLEMEN: The Am. Schr. Benjamin Hale, having been discharged of her cargo of wire, the master has requested me to order a further survey of his vessel to ascertain her condition and the cost of placing the vessel in a perfect seaworthy condition.

You are hereby requested to repair alongside and on board of said vessel and make an examination of her. You are also requested to employ a competent submarine diver to assist you in your examination and attach his report with yours.

If, in your opinion, the vessel can be placed in a thorough seaworthy condition at this port, you will please make an estimate of the cost of such repairs, and make such recommendations as you may deem best for the benefit of all concerned.

You will please make your report to me in writing to which you will be sworn.

Yours respectfully, CHARLES J. CURRY,
Notary Public, Monroe County, Fla.

KEY WEST, *May* 12, 1893.

To Messrs. Williams, Sawyer & Bethel, members of the board of survey of Am. Schr. Benjamin Hale, of ——, —— ——, master, now lying in the port of Key West.

GENTLEMEN: According to your instructions I have made a survey of the bottom of the schooner Benjamin Hale, and report as follows:

Forward: Find forefoot gone about five feet up from keel,
54 lower part of stem split open, keel ground down nearly to garboard streaks, oakum sticking out of wood ends, cement in seams and butts on floor started. The planking on flat of bottom badly ground up fore and aft, averaging about five streaks on each side in some places nearly through particularly between fore and main masts, where butts show signs of heavy strains, oakum sticking out badly in places, found one hole where I could put in my whole hand and feel timbers on the inside, and strong inward suction, keel abreast here badly gone in places inside of garboards, starboard side worse chafed, find chafes in planking a few feet below water abreast of forerigging.

Aft: Find keel ground down nearly to dovetail plates, stern post good, in wood ends seam cement slightly started, where wooden battens and canvas have been partly nailed on, fore-and-aft seams started and open low down, more on port side where some battens are nailed on, but more seams wide open, gudgeons and pintles good but woodlock gone, bolts in keel aft sticking out from six to eight inches.

Submitted respectfully.

BRADISH W. JOHNSON,
Submarine Diver.

KEY WEST, FLA., *May* 13, 1893.

Charles J. Curry, notary public.

SIR: In compliance with your request, dated May the 10th, the undersigned again repaired on board the schooner Benjamin Hale, and held a thorough examination of the said vessel and herewith make the following report:

We find very little water in the vessel, hold entirely free from cargo, overhauled fore and aft, and found no visible strain or damage to the vessel from the inside, again overhauled hull of vessel from outside above water (she being now well out of water) found rudder broken away from rudder post, upper rudder brace started and wood ends around stern post opened, we also found planks aft of forechains on starboard side about three inches under the water badly chafed, and seams and butts around sides of vessel more or less opened and have to be caulked; no strain visible around decks
of vessel. We find from submarine diver's report hereunto
55 attached the condition of vessel's bottom. There being no convenience at this place to haul the vessel out of water, it will therefore be necessary to heave her down so as to be enabled to

put such repairs to keel and bottom of vessel as may be required to make her seaworthy.

By careful inquiring we find that the cost of heaving said vessel down, and keep her free of water for ten days, furnishing all gear and labor to perform said work, will cost twenty-five hundred dollars, and for materials and labor repairing said vessel to make her seaworthy four thousand dollars, not including the wharfage which is two cents per ton while the vessel is hove down.

We recommend Schr. Benjamin Hale be repaired and put in seaworthy condition.

We respectfully suggest that if *not* repaired at this place, that temporary work be done to said vessel, so that she can be towed to the nearest port where she can be taken out of water and repairs done as recommended.

Respectfully submitted.

JOHN WILLIAMS,
Master Mariner.
JOHN W. SAWYER, *Merchant.*
CHARLES W. BETHEL,
Master Shipwright.

COUNTY OF MONROE, *ss:*

I, Charles J. Curry, a notary public in and for said county, duly commissioned and sworn, dwelling in the city of Key West, do certify the foregoing to be true and exact copies of original documents on record in my office.

In testimony whereof, I hereunto set my hand and notarial seal this 17th day of May, A. D. 1893.

CHARLES J. CURRY,
Notary Public, Monroe Co., Fla.

56 *Diver's Report, Attached to Libel of Reuben Ireland.*

DRY TORTUGAS, *May 3rd*, 1893.

To whom it may concern:

At the request of the representative of the owners of the tug Clyde, I made a careful examination of the bottom of the Amer. Schr. Benjamin Hale, lately having been ashore on the Florida reef, assisted off by licensed wreckers and now in the harbor of Dry Tortugas, and found as follows, to wit:

Stern post started and seams and butts open the entire length of the vessel. I also found that the bottom of the vessel from the main to the forward hatch was very badly chafed in fact almost through, the keel is entirely chafed away, leaving only the bolts which are twisted in every conceivable shape. At the stern post the planks are open about one inch on the starboard side.

Repairs.

I made the following temporary repairs, battened both sides of stern post, also seam above garboard plank on port side about 15 feet long.

Respectfully submitted.

PELLER ROPER,
Submarine Diver.

KEY WEST, FLA., *May* 11, 1893.

To whom it may concern:

I have the honor to report that at the request of parties interested, I made an examination of the bottom of the Am. Schr. Benjamin Hale now lying at Taylor's wharf, Key West, Fla.

Started down at rudder on port side. I find the heel of the rudder is chafed from 6 to 8 inches, the keel from the stern post to a distance of about 6 feet is chafed about 8 inches from that point to the bow keel is chafed away to the garboards, and bolts under keel turned up from 3 to 7 inches. I find on the port side two pieces of sheathing or planking from the garboard streak up, starting at nothing from a point about five feet from the stern post and gradually thickening to about ⅞ of an inch, at or near the center of the
57 vessel, and from thence forward diminishing in the same manner; in several places they are chafed nearly through. I find also that the main planking is chafed nearly through in several places.

From rudder on starboard side. I found the entire part of that portion of the vessel that would rest on the ground badly chafed and some bolts in the planking near the keel projecting out about an inch. At a point about opposite the foremast, I found three large seaweeds sticking out from the vessel, and about three feet distant I found two others. I pulled on them, and they were so fast that I was afraid that if they were taken out it would cause the vessel to leak worse, so left them in there. I am of the opinion that the vessel is holed in both places and that the suction pulled in the seaweeds. I also find that oakum is out of the seams in several places on both sides of the vessel and the seams are open to such an extent that when placing my finger over them, I could see the mud sucking in the vessel from both sides of my finger. I also found several slats nailed along the garboards and seams on both sides of the vessel.

Very respectfully, ALONZO ALBURY,
Submarine Diver.

And afterwards, on the 24th day of June, 1893, the marshal returned said writ of *vend. ex.* duly executed showing that he had sold the said vessel, her tackle, &c., as commanded at public auction for the sum of five thousand and five dollars; which sum of five thousand and five dollars he had deposited in the registry of this court.

Whereupon the clerk having taxed the costs and expenses herein computes the salvage on the said vessel to be twelve hundred and twenty-five dollars ($1,225).

And the consignee files a supplemental account against the said vessel and cargo on ac. of the master forwarding the said cargo, and a special account against the said vessel and owners.

And on June 26th, M. S. Moreno, Esq., agent of the underwriters, pays into the registry of the said court $1,100 as a contribution towards the said expenses. Final average adjustment to be made hereafter.

58 Whereupon the clerk files his supplemental statement as follows:

IRELAND AND SINCLAIR ET AL.
v.
SCHR. BENJ. HALE AND CARGO. } Salvage.

Supplemental Statement.

Proceeds of vessel	$5,005.00	
P'd by underwriters ac. do	1,100.00	
		$6,105.00
Respondent proctor's fee	$137.50	
Marshal's fee and disbursements	171.83	
Clerk's fees and costs	94.90	
Consignee, bal. on 1st ac.	397.01	
" 2nd ac.	1,407.75	
" special ac.	1,589.06	
Salvage on vessel	1,225.00	
		$5,023.05
Residue p'd ag't of owners		$1,081.95

Respectfully submitted, E. O. LOCKE, *Clerk.*

Whereupon the salvage and the costs are paid in accordance with the said statement, and the residue is held in the registry of the said court to await the decision upon the petition filed June 27, 1893, in the words and figures following, to wit:

District Court of the United States, Southern District of Florida.
In Admiralty.

JAMES ST. CLAIR ET AL.
vs.
THE SCHR. BENJ. HALE & CARGO. } Salvage.

To the Hon. James W. Locke, judge of said court:

The petition of the National Board of Underwriters of New York would respectfully show to your honor that by the evidence
59 and proceedings had in this honorable court in the case of James St. Clair *et al.* in a cause of salvage against the schooner Benjamin Hale and cargo, it would appear that said schooner was bound from Boston to Velasco, Texas, with a cargo of barbed and other wire; that while on her voyage she ran ashore on the Bahama banks and was obliged, in the opinion of the master, in order to save the vessel and cargo, to jettison a portion of her cargo; that afterwards the schooner again ran ashore on Bird Key shoal near Tortugas on the Florida reef, and the master was obliged to accept the assistance of wreckers in order to save the said vessel and the balance of her cargo; that the property has been placed to a great expense by paying salvage charges, costs of court, wharfage,

storage, reshipping, &c.; that the owners of the vessel failed to advance its proportion of salvage and expenses, and in consequence that the vessel had to be sold by order of this honorable court; that the vessel was sold for the sum of five thousand and five dollars, which amount was paid into the registry of this court; that there is now due from the above-named vessel an amount not yet ascertained to the cargo of the said vessel as its proportion to the contribution from general average charges:

Wherefore, your petitioners would most respectfully pray that after the salvage, court expenses and consignee's bills have been paid, that this honorable court will decree such sum to your petitioners from the remainder of the proceeds of sale as may be ascertained to be due as the share of the schooner Benjamin Hale in the contribution of general average charges, and for such other relief in the premises as may be just and right, and they will ever pray.

MASON S. MORENO,
Agent of National Board of Underwriters of New York.

Sworn to and subscribed before me this 22nd day of June, A. D. 1893.

GEO. W. ALLEN, *N. P.*

And the clerk pays the costs as follows:

Received from E. O. Locke, clerk, one hundred and thirty-seven and $\frac{50}{100}$ dollars, balance proctor's fee.

GEO. W. ALLEN, *Proctor.*

60 The plaintiff then produced a certified copy of a judgment and other proceedings and matters relating thereto in a cause of contract, between the master of the schooner Cactus and the cargo of wire formerly shipped in schooner Benjamin Hale, in the United States district court in admiralty for the eastern district of Texas at Galveston, it being agreed that the libel and other papers should be admitted as evidence of the facts therein contained, as though the same was taken by depositions of the parties or by other formal proofs; same following, and marked "Exhibit 16."

EXHIBIT 16.

Libel.

Filed August 7th, 1893.

To the Honorable David E. Bryant, judge of the district court of the United States for the eastern district of Texas:

The libel and complaint of L. S. Wiley master of the American schooner Cactus, and agent of James B. [illegible]ake of Bath, Me., managing owner of said schooner Cactus, against six hundred and sixty-six tons of barbed and smooth wire and staples, the same being the cargo of the schooner Benjamin Hale, lately cast away on Tortugas, Florida keys, and transhipped by John Hall, master of

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the Benjamin Hale, and agent for the owners of the said cargo, on the said schooner Cactus from the port of Key West to Velasco, Texas, consigned to the Washburn and Moen Mfg. Co., of Houston, Texas, in a cause of demurrage, affreightment, wharfage, and discharging, and other expenses, civil and maritime, showeth:

1. That the libellant at Boston, Mass., on the 14th day of June, A. D. 1893, by a certain charter-party of affreightment of that date, which is hereto annexed and marked "A" (this charter-party is marked Exhibit 10) and to which libellant craves leave to refer as a part of this libel, and also by bill of lading dated June 28th, 1893, annexed hereto and marked "B" (copy of Exhibit 18,) and hereby made a part thereof, did demise and let to freight the Sch. Cactus of the burthen of 508 tons or thereabouts, then in the harbor of Key West, Fla., unto the said John Hall, master of the schooner Benjamin Hale, and agent for the owners of said cargo, by which
61 said charter-party, libellant agreed to transport from Key West, Fla., to Velasco, Texas, about six hundred tons of barbed wire or smooth wire and staples, consigned to the Washburn & Moen Mfg. Co. of Houston, Texas, the said wire being a portion of the cargo of the schooner Benjamin Hale cast away upon Tortugas, Fla. keys, while on a voyage from Boston, Mass., to Velasco, Texas, said cargo being rescued from said schooner in a damaged condition and transshipped.

2. That among other things in the said charter-party the said charterers agreed to pay libellant for transporting said cargo from Key West to Velasco at the rate of two dollars and twenty-five cents per ton, freight payable upon arrival at destination, and charterers to load, stow and discharge the said cargo at their expense.

3. That it was agreed in the said charter-party that seven working days (Sundays excepted) should be allowed for loading the schooner at Key West, and five working days (Sundays and legal holidays excepted) should be allowed for discharging the said schooner in the port of Velasco, and that the said charterers agreed to pay said libellant in the sum of fifty dollars per day for each and every day of delay and detention over and above the stipulated time for loading and discharging.

4. That in pursuance of the said charter-party (the said schooner Cactus having been put in readiness to perform the said voyage) the said master, on the 16th day of June, A. D. 1893, at the hour of noon reported himself at the port of Key West to the said charterers ready to receive the said cargo on board the said schooner and the said charterers on the same day commenced loading the said schooner. But, notwithstanding that said notice was duly given, as aforesaid, and notwithstanding the schooner Cactus was from that time at the disposal and direction of the said charterers, and notwithstanding there was no fault on the part of libellant, the said charterers, by their own neglect, did not load the said schooner and give her dispatch from the port of Key West within 7 days but delayed her until the 28th day of June, 1893, at night, causing a delay of three and one-half days to libellant, when said charterers completed her lading and she cleared for the voyage set forth in the charter-party.

62 5. That the said schooner Cactus proceeded on her voyage and arrived at the port of Velasco, Texas, on the 14th day of July, A. D. 1893, and upon the same day the master of the said schooner reported to the Washburn and Moen Mfg. Co. of Houston, Texas, consignees of cargo that he was ready to discharge the same.

6. That the said Washburn and Moen Mfg. Co. refused to receive the said cargo although repeatedly requested by the said libellants so to do and though often requested to pay the freight and demurrage upon said cargo the said Washburn & Moen Mfg. Co. refused, and still continues to refuse to pay the same or any portion thereof.

7. That the said libellant awaited until the 1st day of August, 1893, and then commenced to discharge the said cargo at Velasco, to his own order, commencing to discharge at 7 a. m. and completing discharge on Aug. 5th, 1893, at 4 p. m. and that by reason of the said Washburn & Moen Mfg. Co.'s refusal to receive said cargo at Velasco, libellant was delayed fifteen and one-half days over and above the time stipulated for discharge in the said charter-party.

8. That the said libellant was forced to pay the cost of discharging, and wharfage charges thereon at Velasco, and for thirteen telegrams sent on behalf of said cargo, all of which expense to schooner Cactus was occasioned by default of said charterers.

9. By reason of the aforesaid premises the said cargo became liable to the said schooner Cactus for the sum of fourteen hundred and ninety-eight dollars and fifty cents freight upon six hundred and sixty-six tons of barbed wire, smooth wire and staples as per charter, the weight of said cargo having been carefully ascertained by libellants at Velasco.

And also for the further sum for demurrage at the rate of 50 dollars per day for three and one-half days' delay at Key West, and fifteen and one-half days at Velasco, amounting to the sum of nine hundred and fifty dollars.

And also for wharfage paid by said Cactus upon said cargo of 1,493,500 pounds at 1¼ cents per hundred ponds amounting to one hundred and eighty-six dollars and sixty-nine cents.

And also for discharging said cargo at Velasco, Texas, 666
63 tons at 75 cts. per ton amounting to four hundred and ninety-nine dollars and fifty cents.

And for thirteen telegrams paid by libellant on account of said cargo, thirteen dollars and eighty-five cents, all of the aforesaid amounts giving a total of three thousand one hundred and forty-eight dollars and fifty-four cents, payable by the said cargo to the libellant and libellant hereby claims a lien upon the said cargo for all of the said amounts.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the honorable court, and that the said six hundred and sixty tons of barbed and smooth wire and staples are now in the port of Velasco, in the said eastern district of Texas.

Wherefore libellant prays that process of attachment in due form

of law according to the course of admiralty and maritime jurisdiction may issue against the said cargo of wire and staples and that the Washburn and Moen Mfg. Co. of which company P. W. Moen is treasurer, and Wm. E. Rice, president, of Worcester, Mass., shippers of the said cargo of wire and staples, and that the Washburn & Moen Mfg. Co. of Houston, Texas, of which company Geo. A. Cragin is duly credited agent, and that John Hall, late master of the schooner Benjamin Hale, of Boston, Mass., and all parties interested in said cargo be cited to appear and answer all and singular the matters aforesaid and this honorable court will pronounce for the freight, demurrage, discharging, wharfage and all other charges claimed by libellant as aforesaid, with costs, and that the said 666 tons of wire and staples may be condemned and sold to pay the same, and that the court will grant to libellant such other and further relief as in law and justice they may be entitled to receive.

J. B. SHEA,
Proctor for Libellants.

L. S. Wiley, master of the American schooner Cactus the libellant within named, being duly sworn according to law, says that the matters stated in the foregoing libel so far as they are therein stated as of his own knowledge, are true, and so far as they are
64 therein stated as on information derived from others, he believes them true and that he is the master of the schooner Cactus and fully authorized to act therein.

L. S. WILEY,
Master Schooner Cactus.

Subscribed and sworn to before me the undersigned authority, this 5th day of August, 1893.

[SEAL.] F. W. VAUGHAN,
Notary Public, Brazoria Co., Texas.

In the District Court of the United States for the Eastern District of Texas, Holding Session at Galveston.

From the Minutes of said Court, October Term, October 19th, 1893.

L. S. WILEY ET AL.
vs.
666 TONS OF BARBED AND SMOOTH WIRE AND Staples *et al.* } No. 654, A. D.

And, now, to wit, on this 19th day of October, 1893, this cause coming on to be heard upon the pleadings and proof and arguments of advocate of libellant and claimant, and due deliberation being thereupon had, it is ordered, adjudged and decreed that the libellant L. S. Wiley *et al.* do have and recover of the said 666 tons of barbed and smooth wire and staples the amount of his claim, as set forth in libel, to wit: three thousand, one hundred and forty-eight and $\frac{54}{100}$ dollars ($3,148.54), together with costs of suit and expenses.

And upon motion of J. B. Shea, proctor for libellant, it is further

ordered, adjudged and decreed that unless an appeal be taken this decree within a period of ten days, after the rendition here that the clerk of the court shall proceed to pay the libellant much of the funds realized from the sale of said cargo of wire no in the registry of the court, as shall be necessary to satisfy aforesa claim of libellant.

It is further ordered, that unless an appeal *to* this decree is tak within the period aforesaid specified, the clerk of the cou
65 shall proceed to pay out of the said fund in the registry the court realized from aforesaid sale all costs and expens incurred.

It is further ordered that the amount due libellant in this decr may be paid to J. B. Shea, proctor for libellant, and the clerk hereby directed to draw the check in favor of said J. B. Shea cordingly for the use and benefit of the libellant.

ALECK BOARMAN, *Judge.*

Order of sale—Issued Sept. 8th, 1893.
Publication of sale made Sept. 9th, 1893.
Marshal's return—Filed October 9, 1893.

United States District Court, Eastern District of Texas, at Galvesto

L. S. WILEY, Master Am. Sch. Cactus,
vs.
SIX HUNDRED AND SIXTY-SIX TONS of Barbed and Smooth Wire and Staples. } No. 654. In Admiralt

The President of the United States of America to the marshal the eastern district of Texas, Greeting:

In obedience to an order made and entered in said court in sa cause on the 6th day of September, 1893, a copy whereof is he unto annexed and made a part of this writ, you are hereby co manded to sell at public auction to the highest bidder, for cash, the town of Velasco, Brazoria county, Texas, the said 666 tons barbed and smooth wire, and staples, after giving ten days' notice the time, place and terms of sale, by advertisement published in t Galveston *Daily News*, a newspaper published in the city and coun of Galveston, in the State of Texas, and deposit in the registry this court at Galveston, the entire gross proceeds of said sale, abide the further order of the court in the premises.

66 Herein fail not and due return of this writ make.

Witness, the Honorable David E. Bryant, judge of the d trict court of the United States, for the eastern district of Texas, a the seal of said court, at Galveston, this 8th day of Septemb A. D. 1893.

C. DART, *Clerk*,
[SEAL.] By W. L. HANSCOM, *Deputy.*

United States District Court, Eastern District of Texas, at Galveston.

L. S. WILEY ET AL.
vs.
666 TONS OF BARBED AND SMOOTH WIRE and Staples. } No. 654. Admiralty.

Upon consideration of the petition of the libellants herein for a sale *pendente lite* of the property libelled in this suit, and of the recommendation of the marshal presented therewith, and *with* appearing to the court that publication of the monition in this cause has been duly made and that no person has appeared or fi*e*ld any claim to said property.

It further appearing to the court that the greater portion of said property is exposed to the weather and is deteriorating in value, and that it is for the interest of the parties that all of said property be speedily sold.

Wherefore it is considered by the court and so ordered that the marshal of the eastern district of Texas, sell at public auction, to the highest bidder, for cash, at the town of Velasco, Brazoria county, Texas, the said 666 tons of barbed and smooth wire, and staples, after giving ten days' notice of the time, place and terms of sale by advertisement published in the Galveston *Daily News*, a newspaper published in the city and county of Galveston, in the State of Texas, and that the said marshal deposit in the registry of this court,
67 at Galveston, the entire gross proceeds of said sale, to abide the further order of the court in the premises.

DAVID E. BRYANT, *Judge*.

Tyler, Texas, Sept. 6th, 1893.

United States Marshal's Sale.

Published in Galveston Daily News by order of court.

The United States Court, Eastern District of Texas.

L. S. Wiley, Master of American Schooner Cactus and an Agent of James B. Drake, of Bath, Me., Owner of said Schooner Cactus, No. 654, *vs.* 666 Tons of Barbed and Smooth Wire and Staples.

By virtue of an order of sale issued out of the honorable United States district court for the eastern district of Texas, at Galveston, in the above-entitled cause, and numbered, and to me directed and delivered, I will sell the following-described property, to wit: 666 tons of barbed and smooth wire and staples, the same being the cargo of the schooner Benjamin Hale, lately cast away on Tortugas, Florida keys, and transhipped by John Hall, master of the Benjamin Hale, on the schooner Cactus from the port of Key West to Velasco, which I shall expose at public sale, as the law directs, on Wednesday, the 20th day of September, 1893, between the hours of 10 o'clock a. m. and 4 o'clock p. m., in the town of Velasco, Brazoria county, State of

Texas, for cash, to the highest and best bidder, to satisfy said order of sale.

J. J. DICKERSON,
U. S. Marshal, E. D. Texas.
JOHN M. WHELAN, *Deputy.*

Galveston, Tex., Sept. 9, 1893.

Marshal's Return.

Received this order of sale Sept. 8th, 1893, and I executed the same by publishing a notice of sale in the Galveston *Daily News*, a newspaper published in the city and county of Galveston,
68 State of Texas, as by said order directed that the sale would be made of said property on Wednesday, the 20th day of September, 1893, at the town of Velasco, Brazoria county, State of Texas, and by making sale to the highest and best bidder on the 20th day of September, 1893, of the 666 tons of barbed and smooth wire and staples for the sum of $10,000 to B. Blum & Co., they being the highest bidder thereof, and that being the highest secure sum bid for the same. Which has been paid into the registry of the court under said order.

I herewith attach costs and expenses of making said sale, marked Exhibit A.

J. J. DICKERSON,
U. S. Marshal, E. D. T.,
By JOHN M. WHELAN, *Deputy.*

Indorsements: No. 654. Admiralty. L. S. Wiley, master, etc. *vs.* 666 Tons Barbed and Smooth Wire and Staples. Order of sale. Issued September 8th, 1893. C. Dart, clerk, by W. L. Hanscom, deputy. Returned & filed Oct. 9, '93. C. Dart, clerk, by W. L. Hanscom, deputy.

U. S. District Court Registry Account.

1893.

Nov. 1.	Paid clerk's costs & com'r's fees in A. D. 654.	
" "	L. S. Wiley *vs.* 666 Tons Barbed Wire, &c., by order of court	$174.55
" "	Paid marshal's costs & expenses in above by order of court	729.33
" "	Paid J. B. Shea, proctor for libellant in above, fees & expenses, by order of court	70.35
" "	J. B. Shea, proctor, com'r's fee for taking dep't'n.	5.00
" "	J. B. Shea, proctor, freight & demurrage, allowed libellant, by order of court	2,448.50
" "	J. B. Shea, proctor, am't allowed libellant for wharfage, &c.	700.04
" "	Clerk's costs acc't respondent by order of court	3.00
		$4,130.77

United States District Court, Eastern District of Texas, at Galveston.

From Registry Account, page 248.

The United States district court in account with case No. 654.

L. S. WILEY, Master, &c.,
vs.
666 TONS BARBED & SMOOTH WIRE & STAPLES.

1893.		
Oct. 21.	To cash from J. J. Dickerson, U. S. M., E. D. T. proceeds of sale of 666 tons barbed and smooth wire and staples	$10,000.00
Nov. 1.	To amount paid out by order of court to satisfy decree and costs, as per itemized list on page 16 hereto attached.....	4,130.77
	Balance remaining in the registry of the court after the payment of above	$5,369.23

the District Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the district court of the United States, for the east- district of Texas, at Galveston, in the fifth circuit, and district afore- d, do hereby certify the foregoing to be a true and correct copy libel, filed Aug. 7, 1893; and Exhibits A & B attached to libel; cree, entered Oct. 19, 1893; order of sale issued Sept. 8th, 1893, th publication of sale and marshal's return thereon, issued Sept. , 1893, returned and filed October 9th 1893; extract from regis- r account showing amounts paid out by order of court & balance maining in registry in cause No. 654 on the admiralty docket of d court, entitled L. S. Wiley, master, &c., *vs.* 666 Tons Barbed & ooth Wire & Staples, as the same now appears of record, and on file in my office.

To certify which, witness my hand and the seal of said court, at Galveston, in said district, this the 3rd day of May, D. 1895.

C. DART,
Clerk U. S. Dist. Ct., E. D. T., at Galveston,
By W. S. HANSCOM, *Deputy.*

Deposition of H. W. CORTES, taken in Houston, Texas, on May , 1895, which is as follows:

Q. 1. What is your name, age, and place of residence?
A. H. W. Cortes; residence, Houston, Texas; age, thirty-nine.
Q. 2. What business are you now engaged in, and how long have u been engaged in same?
A. Am in the hardware, wholesale and retail and agricultural plement business. Have been in the business here going on ten ars.

Q. 3. Does your business bring you in contact with the handling of all classes of barbed wire, smooth wire, staples, and goods of that character, and if so, what has been your experience in handling that line of goods?

A. We have been handling barbed wire, smooth and annealed wire, and dealing considerably in that line. Have been engaged in this business going on ten years.

Q. 4. During that time what has been your experience in that business with reference to the extent of the business you have been engaged in?

A. We handle large quantities of wire; have a good deal of experience in handling different lines—different names.

Q. 5. Were you familiar with the market price of barbed wire, smooth wire, staples, and goods generally of that character in August and September, 1893, in the markets of Velasco, Houston and Galveston?

A. I was familiar with the market value at that time.

Q. 6. Did you go to Velasco in 1893, September or August, for the purpose of examining a cargo of wire discharged by the schooner Cactus, and if you did, please state how you came to go there.

A. I was invited through the Washburn & Moen Manufacturing Company, by their agent, Mr. George Cragin, to go to Velasco to examine a lot of wire, and I think it was on Aug. 23 or 24, 1893.

71 Q. 7. Did you make an examination of the cargo?

A. Yes, sir; I went over the wire.

Q. 8. Now, please state the extent of your examination, and the extent of the investigation you made at that time, and the purpose of the investigation made by you.

A. I made a thorough examination, walked all over the pile of wire and found the barbed wire consisted of painted wire and galvanized wire, and found some twisted wire and smooth galvanized wire.

Q. 9. How much time did you spend in the examination of the cargo?

A. Probably about two and one-half or three hours; cannot say exactly.

Q. 10. What was the purpose of your examination?

A. For the purpose of ascertaining its market value and the extext of the damage.

Q. 11. From your experience in the business, as above indicated in your former answers, at what did you estimate the damage to the cargo in per cent.? State in detail your estimates of the cargo examined by you.

A. The reel of wire rope I found in good condition and fifteen barrels of clothes lines, of which I opened two or three barrels, and found them in good condition; 250 kegs of galvanized staples,—some were opened, some I opened, and found them in good condition; and five reels of insulated wire. This was badly mildewed, and I figured about twenty-five per cent. damage on that. There were 478 bundles of hay ties. This was badly handled, more or less

rusted. I estimated damage to this at ten per cent. There were some 1,146 bundles of plain wire and 39 bundles of galvanized plain, fine sizes of wire. This wire was in good condition. There were 485 bundles annealed wire. This was badly rusted and estimated the damage about fifty per cent. I estimate the damage in per cent. to the 39 bundles of plain wire and 485 bundles of annealed wire at fifty per cent. There were 578 bundles of galvanized plain wire. This was badly damaged, and I estimated the damage at sixty per cent. There were some 12,625 reels of barbed wire; I did not count them, but was so informed. I thoroughly examined them and found that the painted wire was very badly damaged and
72 worthless. The galvanized barbed wire was very badly damaged. I estimated the damage on that lot at sixty per cent. That comprised the cargo of the schooner Cactus.

Q. 12. Do you consider that the last wire that you referred to in your answer had any market value as wire?

A. No, sir; I do not think it had.

Q. 13. Upon what facts, Mr. Cortes, do you base your conclusion or estimate that that wire had no market value as wire?

A. The large quantity of it. It was hard to sell such a quantity of wire on account of being in such bad and rusted condition.

Q. 14. What do you estimate the damage to the total cargo in per cent.? That is to say, what per cent. of damage, in your judgment, from your examination, did the total cargo sustain?

A. I think it was about eighty per cent.

Q. 15. Please explain how you reached that conclusion.

A. I can arrive at the market value of it, figuring it out I can get the total amount of the cargo, and therefrom I get my estimate of the damage.

Q. 16. What composed the greater bulk of the cargo?

A. Galvanized barbed wire.

Q. 17. From your inspection of the cargo, how much do you estimate the amount of the painted wire to be, to which you have testified?

A. I cannot estimate it. It was impossible for me to get at it. The painted wire was mixed up with the galvanized wire, and I could not, therefore, tell how much there was of the painted wire.

Q. 18. Mr. Cortes, are you in any manner connected with the Washburn & Moen Manufacturing Company or the Reliance Marine Insurance Company, the parties to this suit?

A. I am not.

Q. 19. Have you now, or had you at the time you examined the cargo, or at any time before or since, any interest to the parties of this suit, or interest in the cargo?

A. I have not.

Q. 20. Mr. Cortes, from your examination of the wire and the other goods in Velasco, can you give an estimate of the reasonable market value of the cargo in the condition that it was then in at Velasco, in August and September?

A. It was worth about twenty per cent. of its value.

73 Cross-examination :

X Q. 21. How much would the cargo be worth if in Houston?

A. About ten per cent.

X Q. 22. What part of Velasco was this cargo of hard wire lying at the time you inspected it?

A. I found the galvanized barbed wire, painted wire, smooth galvanized wire and twisted wire, about three squares from the Velasco warehouse or dock. The balance of the cargo was in the warehouse at the docks; that is, the insulated wire, hay ties, wire rope, galvanized staples in kegs, and wire clothes lines in barrels.

X Q. 23. How much of that cargo, Mr. Cortes, was under cover?

A. The last mentioned was all under cover; the first mentioned was not under cover.

X Q. 24. Mr. Cortes, could you, as an expert, tell whether that cargo was injured by salt water or by rain water,—how much by salt water or by other causes?

A. By the salt eating on the wire.

X Q. 25. State how much was injured by salt water and how much by other causes.

A. About seventy-five per cent., I should judge, would be the damage by the salt water, and the other twenty-five per cent.

X Q. 26. Now, Mr. Cortes, how long would it take, from your experience as a hardware man, how much time would elapse, after the wire came in contact with the salt water, before it would be damaged?

A. I think the salt water, the moment it touched the barbed wire, would injure it. If it was to lie out on the docks for three or four months it would be worthless.

X Q. 27. Do you know how long the cargo lay on the docks at Velasco before you examined it?

A. I understand that she arrived there on the 5th of August.

X Q. 28. At whose instance did you examine the cargo?

A. I went at the instance of Mr. Cragin and in his company.

X Q. 29. What position did Mr. Cragin at that time occupy with the Washburn & Moen Manufacturing Company?

A. He was its agent. I received no compensation for my trouble in examining the cargo.

X Q. 30. Did you, or not, receive your traveling expenses?

A. I did.

74 X Q. 31. What became of the cargo, Mr. Cortes?

A. It was sold at auction.

X Q. 32. Who by and who was the auctioneer?

A. I do not know.

X Q. 33. Who purchased it?

A. Ben Blum, of Galveston.

X Q. 34. What did he pay for it?

A. I think it was ten thousand dollars.

X Q. 35. As an experienced hardware merchant, what would the invoice original cost of that cargo be at the factory?

A. About forty-five or fifty thousand dollars.

Direct examination resumed:

Q. 36. In your cross-examination, you stated that in your judgment the damage by salt water was seventy-five per cent., and by other causes twenty-five per cent. Please explain what you mean in this answer so it may be properly understood.

A. The seventy-five per cent. is in the salt water eating on the wire, causing that damage, and the wire was roughly handled.

Q. 37. Estimating that the total damage to the cargo is eighty per cent. and the damage by salt water is seventy-five per cent. of the whole cargo, what per cent. of the total damage do you estimate to have been caused from other causes?

A. About five per cent.

Q. 38. Do you know the condition of the weather at Velasco, with reference to raining much or little, or any, from the time the cargo was unloaded to the time you inspected it?

A. I do not know.

Q. 39. What is the condition of the weather generally in the month of August and September in this climate and at Velasco?

A. Usually August and September weathers are dry.

Q. 40. Do you know, of your knowledge, the date the cargo was unloaded?

A. I do not.

After all of the above testimony, all the exhibits and other evidence had been read to the jury or otherwise admitted, the plaintiff called as experts Arthur W. Parmalee, John D'Ewart and Addison B. Clements, who had been present at the trial, and who had heard all of the evidence, who testified as follows:

75 ARTHUR W. PARMALEE, sworn, testified as follows:

(By Mr. CARVER:)

Q. 1. What is your full name?

A. Arthur W. Parmalee.

Q. 2. Where do you reside?

A. At Worcester, Mass.

Q. 3. And what is your business?

A. I am a manufacturer of wire goods, hardware made from iron.

Q. 4. How long have you been engaged in that business?

A. About twenty-five years.

Q. 5. What is the name of your concern, please?

A. It is the Wire Goods Company.

Q. 6. Are you in any way connected with the Washburn & Moen Manufacturing Company?

A. No, sir.

Q. 7. And you manufacture all kinds of wires?

A. Yes, sir.

Q. 8. How long have you been engaged in the manufacture?

A. About twenty-five years in hardware, and most all that time especially in wire goods.

Q. 9. Are you acquainted with the value of barbed wire and other kinds of wire?

A. Yes, sir.

Q. 10. And were you in 1893?

A. Yes, sir.

Q. 11. And are you also acquainted with the manufacture of wire of all kinds?

A. Yes, sir.

Q. 12. Are you acquainted with the effect of sea water upon plain wire, painted wire, japanned wire, and galvanized wire?

A. Yes, sir.

Q. 13. Have you heard the testimony in this case in regard to what this cargo of the Benjamin Hale was subjected to?

A. Yes, sir.

Q. 14. And have you also heard the kinds of wire that were aboard?

A. Yes, sir.

Q. 15. And you are familiar with those kinds of wire?

A. Yes, sir.

Q. 16. What would be the effect of subjecting a cargo of wire, that cargo, to the perils and dangers which you have heard cited in this case?

A. I should think the wire that was under the salt water for that time would be ruined commercially.

Q. 17. What do you mean by "ruined commercially," as to value?

76 A. I mean that it would have no value in fact. I think the action of the salt water would destroy it so that the wire would not in fact have any value to one who knew what would be the result of it.

Q. 18. What would be the result of it?

A. Well, the wire would rust, and the action of the salt water on it, the salt water would soak into it somewhat as it would into a sponge, not so rapidly, of course, and it would rust, and continue to rust, very rapidly.

Q. 19. Now, is there anything that can be done to prevent that action after it has once commenced?

A. I don't think of anything you could do with this barbed wire; from its shape and style I don't see what you could do with it to save it.

Q. 20. Could anything be done with the plain wire?

A. We could succeed better with that, if we had it at home.

Q. 21. What would have to be done with that?

A. I don't know of anything I could think of that would get the salt out of it. You can reclaim rusted wire some, but if the salt has got into it I don't know any process to get it out.

Q. 22. What would you have to do to recondition the wire, put it in shape?

A. I should hardly know how to put the wire that had been soaked for three or four weeks in the salt water in order again. I don't know of any process.

Q. 23. Could you melt it over?

A. It can be melted over, yes, sir. The plain wire would have the value of scrap.

Q. 24. The plain wire would have the value of scrap?

A. Yes, sir.

Q. 25. When you say "scrap," what do you mean, scrap iron?

A. Wire suitable to go into a cupola, to be melted over.

Q. 26. About the galvanized wire, what would that value be?

A. That would have almost no value because the zinc on it would spoil it for the cupola.

Q. 27. Take the plain wire; how would the cost of melting it over and reconditioning it compare with its value after it was done?

A. The cost of the scrap wire would be very small item compared with the value of finished wire. The value of the scrap wire would be very small compared with the value of good wire.

Q. 28. But I ask you this question, Mr. Parmalee,—per-
77 haps it was a little blind,—you say that the plain wire could be melted over?

A. Yes, sir.

Q. 29. How would the cost of taking that cargo of plain wire to a place and melting it over, redrawing it and reconditioning it, so that it would be in good order, compare with its value after it had been done and delivered, say, at Velasco?

A. I can't estimate anything about the cost of freight, getting it back here. If we have the scrap here I can judge pretty closely what it would cost to put it in order again.

Q. 30. Suppose you had it here, would it have to be brought here to recondition it?

A. Unless there are mills suitable for it.

Q. 31. Are there any mills in Texas suitable for it?

A. I don't know of any.

Q. 32. How would it compare?

A. I should think the scrap wire might be roughly estimated as worth a seventh of the price of finished wire.

Q. 33. And that is for melting over?

A. Yes, sir; unless there is zinc on it.

Q. 34. I understand in the case of galvanized wire you say you could do nothing with it?

A. I shouldn't want it at any price.

Q. 35. What is the market in Key West for wire goods of the kind of wire of the cargo of the Benjamin Hale?

The COURT: You needn't put in any further evidence on that point.

Mr. CARVER: I was also going to speak in regard to the value of wire at Velasco.

Q. 37. What was the market value of wire at Velasco, as compared with the value here, in good condition?

A. It would be worth the freight and expense in addition to the price here.

Q. 38. Is all the barbed wire sent from Massachusetts out there?

A. It was sent from the Middle and Eastern States.

Q. 39. Have you ever seen wire submitted to the action of salt water, sea water?

A. Yes, sir.

Q. 40 And have you seen the effect of it?

A. Yes, sir; and at times have made various experiments to see what coating of hardware could protect it better than others.

78 Q. 41. Coating of what?

A. What coating of hardware would protect it from rust better than others.

Q. 42. You have made experiments in that way?

A. Yes, sir.

Cross-examination.

(By Mr. STIMSON:)

X Q. 43. Don't they dip galvanized wire in salt water in the process of manufacturing it? Isn't that part of the process?

A. I never heard of such a process; no, sir.

X Q. 44. Then isn't galvanized wire used very largely for ships' rigging?

A. Yes, sir.

X Q. 45. Were you here yesterday when Mr. Rice was testifying, of the Washburn & Moen Company?

A. Yes, sir.

X Q. 46. I understood from him to say that the galvanized wire suffered very little, the plain; that is, that the painted kind would suffer a great deal from the salt water; isn't that so?

Mr. CARVER: I didn't understand him so. He said galvanized wouldn't suffer as much.

X Q. 47. Isn't that so?

A. The general theory is that galvanizing wire protects it better than any other coating that we know of; but the ordinary painted wire is rather a cheap finish. I think a good-backed japanned wire would last as long as the galvanized wire would.

X Q. 48. Of course your remarks which you have just made about wire apply sole to that part of this wire which was actually submerged in salt water, and not to any part which was merely landed on the wharf afterwards, and perhaps rained on afterwards; you meant salt-water damage, did you not?

A. I spoke of that severe salt-water damage.

X Q. 49. If a lot of wire had been under salt water for a few days and was then put upon the wharf, and at once they had very heavy rainstorms, what would the effect be of that? Would it have any value in washing the salt out of the wire?

A. It would be rather beneficial than otherwise; the rain water would be less injurious than the salt water.

X Q. 50. Galvanized wire, when exposed to the action of salt

water in that way, is there not afterwards a sediment of white
79 deposit on it, visible upon it, which was caused by this salt-water rust?

A. I should suppose there would be.

(By the COURT:)

Q. 51. Mr. Parmalee, what is galvanized wire, old galvanized wire, worth a ton as scrap?

A. I should hardly know what to say.

Q. 52. Any value?

A. It has some value. There are men that can use it for some other purposes.

Q. 53. Any market value?

A. It is probably somewhere from fifteen to eighteen cents per pound.

(By Mr. STIMSON:)

X Q. 54. Whether one of the processes in making galvanized wire is not to submerge it in water charged with sal ammoniac, or something of that sort.

A. They do use sal ammoniac.

X Q. 55. And isn't that a salt water, one of the salts of sea water?

A. Well, I couldn't say about that.

X Q. 56. And one further question; when you said you were familiar with the markets at Velasco, and at Boston, were you familiar with them during the course of the year 1893?

A. Yes, sir.

X Q. 57. And can you tell me whether the market at Velasco, on the 20th of September, 1893, was higher or lower than the market in Boston in the previous March, 1893?

A. It was never lower there than it was here. I can't give you data without looking it up; I don't carry it in my head.

X Q. 58. I don't mean at the same time. I don't mean whether wire at Velasco was worth on Sept. 20 what it was in Boston Sept. 20, plus freight and expense, but whether the market for wire at Velasco in September was higher or lower than in March, in Boston?

A. I couldn't answer the question offhand; I should have to look up the records.

X Q. 59. Have you no memory of that year?

A. Yes, sir.

X Q. 60. Were the prices there as high as they were in September, six months before, in March?

The COURT: He has told you he couldn't tell you. I think I will have to stop that, Mr. Stimson; it is mere guesswork.

(By the COURT:)

Q. 61. Mr. Parmalee, if you had heard that a lot of five
80 hundred tons of galvanized wire for fences had been sold for eight or ten thousand dollars, would you think it sold for scrap?

A. I should be afraid the man who bought it had made a mistake.

Q. 62. Would you think it was bought for scrap?

A. If it was bought for scrap, it wouldn't bring anything like that.

(By Mr. CARVER:)

Q. 63. Will you tell us what you would think in regard to a man who purchased a lot of wire and paid $10,000 for it in Velasco, that had been subjected——

The COURT: Put that question again, Mr. Carver.

Q. 64. Will you kindly tell us what you would think in regard to a sale of that cargo of wire at Velasco for $10,000, if the condition as you have already heard read in September, 1893?

A. I think the man is stuck who bought it, as we say in the trade. He will find it out sooner or later.

W. JOHN D'EWART testified as follows:

(By Mr. CARVER:)

Q. 1. What is your full name?

A. William John D'Ewart.

Q. 2. Where do you reside?

A. Rutland, Mass.

Q. 3. How old are you?

A. Fifty-one.

Q. 4. What is your business?

A. Inspector of wire.

Q. 5. How long have you been in the wire business?

A. Thirty years.

Q. 6. Where have you been in the wire business?

A. In Manchester, Eng., and in Washburn & Moen's.

Q. 7. And you are now connected with the Washburn & Moen Manufacturing Company?

A. I am in my twenty-third year.

Q. 8. What do you have charge of?

A. Inspecting the wire before going on to the market.

Q. 9. Inspecting the wire before going on to the market?

A. Yes, sir.

Q. 10. Are you familiar with all kinds of wire goods?

A. Pretty much so.

Q. 11. Are you familiar with all kinds that are manufactured by the Washburn & Moen Manufacturing Company?

A. Not all kinds, but the greatest portion of them.

Q. 12. Were you familiar with all kinds of the wire that
81 were shipped on the Benjamin Hale?

A. The insulated wire I am not familiar with.

Q. 13. Are you familiar with the rest of it?

A. Yes, I am.

Q. 14. And you inspect it as it comes out?
A. Yes, sir.
Q. 15. Do you know how this barbed wire is made?
A. Yes, sir.
Q. 16. Will you tell us what the process was which was used in the manufacture of the galvanized barbed wire shipped aboard the Benjamin Hale? Tell us the process of manufacturing.
A. This wire is taken from a rod, a wire rod, and drawn to the given size, to the size of this wire; then it is annealed clean, and coated with spelter in process.
Q. 17. And then what is done with it?
A. Then it is taken to the barbed-fence machines and twisted in this way, and those barbs put up by machines which they have for that purpose.
Q. 18. Is there any portion of that wire what is called "wiped"?
A. Yes, sir.
Q. 19. Now, will you tell us what wiping means?
A. We run the wire between asbestos under pressure.
Q. 20. What is the reason for that,—what is the purpose of it?
A. To make it smooth, so that it will feed easily through the machines without interruption.
Q. 21. For any other purpose?
A. Well, I suppose it saves the spelter as well.
Q. 22. Now, take a piece of barbed wire before it is wiped, and take a piece of wire after it is wiped, which has the most spelter or zinc on it?
A. The unwiped has the most spelter on it.
Q. 23. And what is the spelter composed of?
A. Zinc.
Q. 24. Now, was the wire which was in the cargo of the Benjamin Hale wiped wire?
A. All fence wire is wiped wire.
Q. 25. Now, these barbs that are spoken of, how are they made?
A. They are crowded round the wire.
Q. 26. And then they are cut off?
A. Yes, sir.
Q. 27. So that the ends of the wire are bare iron?
A. Yes, sir.
Q. 28. The ends of the wire are bare iron?
A. Yes, sir; no spelter on that.
82 Q. 29. The ends of the barbs, I should say?
A. Yes, sir.
Q. 30. What is done after that? After that is completed, after the barbs are put on, how is it put up commercially?
A. Put up on reels made in the shape of spools.
Q. 31. Do you know how much they put on?
A. Somewhere about a hundred pounds; I don't know exactly.
Q. 32. Is that reeled like a rope?
A. Yes, sir.
Q. 33. And that is done by machinery?
A. Yes, sir.

Q. 34. So that portions of the barb strike the plain part of the wire?

A. I don't see how it could avoid it.

Q. 35. Are you acquainted with the effects of salt water on galvanized and plain wire?

A. Yes, sir.

Q. 36. Have you ever had experience with the use of salt water in regard to wire?

A. Yes, sir; I experiment a great deal with it myself.

Q. 37. Have you ever heard the testimony here of what occurred to this wire on board the Benjamin Hale?

A. Yes, sir.

Q. 38. Have you heard it read?

A. Yes, sir.

Q. 39. And the condition it was seen in down there?

A. Yes, sir.

Q. 40. What would be the effect of such an experience to a cargo of barbed wire, that is, with regard to that portion of the wire which was wet?

A. It would be utterly ruined.

Q. 41. What could be done with that wire?

A. Nothing; not to remove the salt; you can't remove salt from wire.

Q. 42. Would the plain wire have any value?

A. It would be worthless, worse than the galvanized, again; that is, for salable purposes.

Q. 43. Could anything be done,—could this wire be melted up, this galvanized wire, and used over again?

A. Yes; we could cut it up and melt it, and work it over again.

Q. 44. Could you cut up the barbed wire and melt it over again?

A. I guess they wouldn't give you much for it. It is possible to do it, but it wouldn't be worth much.

Q. 45. If you should melt up this wire with the zinc in it, and should afterwards make it up into wire, how would the cost of melting it and putting it into condition again compare with its
83 value after it was put into condition?

A. I don't think it would pay, because the spelter is injurious to iron; it doesn't make good scrap iron, and if they had to buy it, I don't believe they would purchase it at all. We try to use up our own scrap. I don't think they would buy it.

Q. 46. But your own scrap is not subjected to salt water?

A. No, sir.

Q. 47. Would this salt water cause this wire to rust?

A. Yes, sir.

Q. 48. Would anything stop that rusting?

A. Where it is perfectly covered, I don't know about that, but in the loading up there, there is a very thin covering on there, and if the wire is anywhere cracked or cut with the barb it is just as sure as slow consumption; that is, it may take some time for it to be rotten, but it is just as sure as it has got in there it will be rotten.

Q. 49. Can you get it out in any way?

A. You can't get it out in any way, nor bake it out. I say you can't remove it in any way; you can't either bake it out or burn it out.

Q. 50. You said something about the wire having portions of it clipped off by the barb.

A. Yes.

Q. 51. What was that?

A. That removes the spelter, leaves it bare.

Q. 52. That is, if the barbs touch the plain part of the wire——

A. The spelter is very thin, I say, and wherever it has got cut the salt water will take effect.

Q. 53. As I understand you, in reeling the wire these sharp points are liable to remove some of the spelter from the plain part of the wire?

A. Yes; it is liable to.

Q. 54. How do you know the salt can't be removed?

A. It has been tried at our place.

Q. 55. Have you tried it?

A. It has been tried under my supervision.

Q. 56. You are acquainted with the value of wire?

A. Not particularly, I am not. I haven't anything to do with the prices of wire.

Q. 57. You don't have anything to do with the price?

A. No, sir.

84 ADDISON B. CLEMENTS (*sworn*).

(By Mr. CARVER):

Q. 1. What is your full name?

A. Addison B. Clements.

Q. 2. Where do you reside?

A. Worcester, Mass.

Q. 3. And what is your business?

A. Chemist.

Q. 4. And have you had any business connection with relation to wires?

A. Yes, sir.

Q. 5. How long have you been a chemist?

A. I have been with this Washburn & Moen Manufacturing Company for ten years.

Q. 6. How many years?

A. Ten years.

Q. 7. And have you ever been with any other concern?

A. Yes, sir.

Q. 8. Who?

A. The Worcester steel works, and the Birmingham, Ala., steel works.

Q. 9. And is your business confined to hardware and wire as chemist?

A. Nearly everything in the wire line.

Q. 10. You are acquainted with how this wire is manufactured?

A. Yes, sir.

Q. 11. And what the component parts are that go into this manufacture?

A. Yes, sir.

Q. 12. Have you heard the testimony here with regard to what occurred to the cargo of the schooner Benjamin Hale?

A. Yes, sir.

Q. 13. You have been present here and heard the testimony?

A. Yes, sir.

Q. 14. And you know the different kinds of wire that were in the cargo, you have heard them stated?

A. I have heard them all stated.

Q. 15. And you know what those terms mean?

A. Yes, sir.

Q. 16. Now what would be the effect of the wire on the Benjamin Hale that was wet by sea water?

A. The wire that was coated with zinc would stand the longest.

Q. 17. But I mean, what would be the effect on the value of the wire with regard to the action of these perils that have been described here, both the galvanized and the other kind?

A. Well, its market value is destroyed as wire for the purpose intended.

85 Q. 18. And that applies to all kinds of wire that have been described here that had been wet?

A. Yes, sir.

Q. 19. You don't know anything about the market value, I believe?

A. No, sir; I have nothing to do with that.

Q. 20. Did you ever make experiments with regard to these wires?

A. Yes, sir.

Q. 21. After the wire has been subjected to sea water and commenced to rust, is there any way you can get the salt out of it?

A. No, sir; except you destroy the wire.

Q. 22. Except you destroy the wire?

A. You have to destroy the wire to get rid of the salt.

Q. 23. Something has been said about sea water; do you know what sea water is composed of?

A. Everything.

Q. 24. I have heard there is gold in sea water, but what do you mean by everything?

A. All known elements are contained in sea water in solution.

Q. 25. How does that differ from salt which you put in water?

A. That would be merely salt and water.

Q. 26. What would be the effect of sea water as compared with salt and water on iron goods?

A. I have never made any direct experiments, but I should think full as bad as common salt water.

Q. 27. Why?

A. There are other elements to enter into the injurious action against the wire in sea water than there is in common brine.

The defendant introduced the following evidence:

Robert M. Hanna.

ROBERT M. HANNA testified that he was fifty-six years of age; was the chief inspector for the National Board of Marine Underwriters of New York; that he proceeded to Key West May 9, 1893, at the request of J. Raymond Smith, secretary for that board, for the purpose of looking into the disaster of the schooner Benjamin Hale as a representative of the underwriters on hull and cargo; that he arrived at Key West May 12, and at that time all of the cargo of the schooner Benjamin Hale was at Key West except a little that was at Tortugas; that while at Key West it rained hard; that he has
86 represented the National Board of Marine Underwriters since 1887, and valued all kind of cargoes around South America and different parts of the world.

Upon being asked the fair market value, he said he could not answer the question as he did not think there was any market value at Key West; that he did not know the market value of wire in Texas, but he was familiar with the value of wire in New York because he had the price in his hand which was given him by the secretary. He stated that in his judgment the market value of the cargo as it was in Key West would have been, if it had been at a place of shipment, fully $40,000; that in his opinion only a small portion of galvanized wire was damaged, and that the plain wire was damaged fully 50 %; that the sound wire was under cover, but the wire that was wet was all out of doors, and there was galvenized and painted wire, and plain wire without being painted; that some electric wire or hawser and there were staples all unhurt; that it is rarely that a vessel goes from Key West to Velasco; that the freight from Boston to Key West would be as much as the freight from Boston to Velasco. That Captain Hall met him when he arrived at Key West and authorized him about May 18 to charter the Cactus for $1,000.

On cross-examination he stated at this time he was in the employ of the National Board of Marine Underwriters, in which he had been employed since 1887; that the defendant company is a subscriber to the said board. He knew that he represented the underwriters, both on cargo and hull; that he went home before the cargo was forwarded on the schooner Cactus, leaving matters for the underwriters on cargo in charge of Mason S. Moreno; that he superseded him when he went there, and when he left there Mr. Moreno then had charge for him; that he is the agent for the board at Key West; that when he left Key West he instructed Mr. Moreno about shipping the cargo and to take charge of the same; that he had paid the money into court in the salvage suit at Key West; that he instructed Mr. Moreno to see that the vessel was secured, and that the cargo was properly shipped to Velasco, according to the original bill of lading; that he told Mr. Moreno to get a bill of lading from the Cactus; that he

offered to charter the Cactus in New York after her return;
87 that he always insisted on Captain Hall's forwarding the cargo. He knew that Captain Hall left Key West and came to Boston before the Cactus was chartered; that at the time Captain Hall left, the vessel was in charge of the court; he left no master there. He left Mr. Taylor in charge of the cargo, with his power of attorney to take charge of the ship. He did not know of any abandonment by the Washburn & Moen Manufacturing Company until two months after he left Key West. He did not see any representative of the owners of the cargo at Key West. He employed and paid counsel in behalf of the underwriters on cargo to defend the salvage suit; that he paid other disbursements, the amount of which he has shown in a bill which he has hereto annexed, marked "Exhibit 17;" that Mr. Moreno paid eleven hundred and ninety dollars expenses in relation to the cargo; that he never bought or sold any barbed or plain wire in his life; never acted as broker for the sale of any; did not know of the sale of any plain or barbed wire during the year 1893; that all the knowledge he had with regard to the value of the cargo was derived from the invoice he took from New York, and the appearance of the damage; that he has sold a great deal of cargo in the last eight or nine years, but does not recall an instance of selling any damaged wire except the sale of some he made at Montevideo, a cargo which was bound to Chili. He never sold any in the United States; that he thinks that if cargo commenced to rust, a little oil or paint would help it; that he had no experience as to the action of salt water on galvanized or plain wire, except on this cargo; that his knowledge was confined to this.

On redirect examination he stated he did not see any rust on the cargo except what he has already stated; that he saw nothing like white powder or any like substance; that a copy of his expenses was put in, marked "Exhibit 17."

Deposition of Mason S. Moreno.

Taken in Key West, May 10, 1895.

The said MASON S. MORENO, being about the age of thirty-eight years, and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the
88 matter of controversy aforesaid, I did carefully examine the said Mason S. Moreno, and he did thereupon depose, testify and say as follows, viz: My name is Mason S. Moreno; I am thirty-eight years of age; my residence is Key West, Fla.; I am resident correspondent of the National Board of Marine Underwriters of New York, and also postmaster of the city of Key West; during the latter part of the year 1893, news reached me from Tortugas that the American schooner Benjamin Hale was ashore; I at once dispatched a tug with a special representative on board to render her assistance, at the same time advising said representative to use every means possible to bring the vessel and cargo to the port of Key West; the cargo of the schooner Benjamin Hale was galvanized

barbed iron wire, some painted, and hay-binders; also somewhat appeared to me to be telegraph wire, and one very large wire cable or hawser; the said vessel and cargo were brought to Key West with the exception of a few bundles of wire that had been jettisoned in the endeavor to float the ship; there was also a portion of the cargo consisting, I should judge, of about three thousand bundles landed at Tortugas, which was afterwards brought to Key West by salving vessels; the remainder of the cargo was brought to Key West, to the best of my knowledge, intact. (*Plaintiff's proctor objects to the answer of witness as being hearsay.*)

When I mention that three thousand bales were taken from the vessel, I do not mean to say that the entire lot of three thousand was landed on the beach of Tortugas, as some of it was placed on the salving vessels from the Benjamin Hale and brought to Key West direct, and afterwards the part landed at Tortugas was brought to Key West.

After the arrival of the Benjamin Hale at Key West it was found that she was leaking badly, and it became necessary to discharge her cargo. A portion of it was placed in the warehouse of Messrs. Taylor & Curry at Key West, and the remainder was stored on the land adjoining the said warehouse; all cargo brought up by salving vessels was also stored on same property. The cargo not stored in the warehouse was not placed upon the ground, but was stored on skids. The greater bulk of the cargo that was stored outside of the warehouse was galvanized iron barbed wire. It was my duty
89 to protect the cargo in every way possible with regard to its being properly stored, etc. I saw all of the cargo after it arrived at Key West, and thoroughly examined the same, and I do not consider that the cargo, or any portion of it, was damaged after it was stored at Key West, excepting that a few of the bands that had held the bundles of wire together became broken and the wire separated; these I had repaired and put in proper shipping condition; I would say that I cannot tell how many. I should judge approximately about two hundred bundles became separated in this manner. I do not consider that the galvanized wire was damaged at all either before or after it was landed, as it was very heavily plated; I mean with the exception of the breaking of a few bundles as above stated. (*Proctor for plaintiffs objects to the opinion of the witness being given, as it has not been shown that he has been an expert.*) In my opinion the galvanized iron wire was not in any way damaged by salt water before it was landed. In my opinion I should judge that the entire cargo, taken as a whole, was not damaged more than twenty-five per cent. of its entire value. In my opinion Key West is not a market for wire of this kind, as there is no demand for it and there is no use for it in Key West. I had the cargo prepared for shipment; it was shipped in good condition, I mean reshipped, on the American schooner Cactus, bound for Velasco, Texas. Schooner completed loading June 28, 1893, and proceeded to sea June 29, 1893. It was reshipped in good condition, in my best judgment, except the damage as already stated.

Cross-examination by Mr. PATTERSON, attorney for plaintiff:

I think the greater portion of the three thousand bales which I stated the wreckers brought up here was stored on the land adjoining the warehouse on skids. I examined the vessel's hold before the cargo was taken out of her at Key West. I should judge about one-third of the cargo that was in the vessel's hold at that time was submerged or under water. Some of the cargo discharged from the hold of the Benjamin Hale was also put or stored outside of the warehouse on skids on the land. I think that there was about as much of the cargo taken from the vessel and stored outside as there was of the three thousand bales stored outside. The reason
90 that a portion of the cargo was stored outside and a portion inside was that a party to whom the vessel was consigned had no other facilities. I believe that there was a small portion of the cargo brought here by the wreckers before the arrival of the Benjamin Hale. The first that was brought here before the arrival of the Benjamin Hale was put in the warehouse. In my recollection all of the raw painted iron wire that was first brought here by the wreckers was placed in the warehouse. It was found that the warehouse would not hold all the cargo and we put the best of it, that is, what would sustain more damage outside, inside of it. Our object was to put as much of the dry cargo in the warehouse as possible. Some of the painted raw iron wire and hay-binders was rusted. The bindings of the bundles that I mentioned as having been separated were broken in the discharge of the cargo. I made an examination of the galvanized iron wire and saw none of it that showed any signs of rust. Those bundles with the broken bands on them were put outside. When the bands would break from the bundles which I have spoken of the wire would come uncoiled.

When I say in my opinion that the entire cargo was not damaged more than twenty-five per cent., I did not base this opinion upon figures, but from an examination of the cargo and an estimate. I do not know how many bundles of cargo there were; I do not know how many bundles of barbed wire were landed here. I did know but do not know now. I do not know that it is a fact that the appraisers found over 10,000 bundles of damaged barbed wire; I never saw their report, and after the special agent came here I had no further connection with the case until it became necessary to reship the cargo. I never had any experience before this time of examining cargoes of this character and estimating the damage. I never had any connection with iron works or the manufacture of iron so as to enable me to testify as an expert, except purchasing wire for my own vessels and noticing the effect of salt water on them. The extent of my buying wire for vessels is for rigging and stays for them; this has not been very extensive, not more than $30 a year for the past twenty years, and my purchases have been confined to Key West. My experience is that the action of salt water on wire (galvanized) where it is most submerged is greater than
91 where it is not submerged. (*Attorney for defendant objects to answer of witness on the grounds that he is not testifying to anything brought out by the direct examination.*)

I have noticed that some wire that I have purchased, when exposed to salt water will show corrosion in one year, and some would not under two years.

Direct examination resumed:

At the time that I examined the cargo in hold of vessel, and say that about one-third of the cargo was submerged, the steam pump was going a portion of the time; most of the one-third cargo submerged was galvanized iron wire. I think the greater portion of the cargo taken from the Benjamin Hale was stored inside house. The greater portion of the cargo stored outside on skids was galvanized iron wire.

Deposition of Peter A. Williams.

Taken in Key West, May 10, 1895.

The said PETER A. WILLIAMS, being about the age of fifty-seven years, and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Peter A. Williams, and he did thereupon depose, testify and say as follows, viz: My name is Peter A. Williams; I am fifty-seven years of age; my residence is Key West, Fla.; I am president of the board of trade of the city of Key West. In the month of May, 1893, I was United States marshal for the southern district of Florida. As said marshal I had the schooner Benjamin Hale in my custody, by virtue of an attachment issued out of the United States district court in a salvage suit. I mean the schooner and cargo. The cargo consisted of barbed and other wire. I had the cargo in custody all the time the case was being considered by the court, and until the salvage was paid. I saw the cargo frequently and made an examination of it; the greater portion of the cargo consisted of galvanized barbed wire, I think; I have had very little experience with galvanized iron wire,—some, I have seen it used on the mainland of Florida for fences. I have had experience with galvanized iron wire
92 rigging on vessels. In my opinion, from an examination of the cargo, I thought that the report of the appraisers was right, that is, the cargo was damaged, I should judge, about thirty per cent.; I mean, the appraisers appointed by the court to fix the value of the cargo for salvage purposes, I saw their report at the time. In my opinion, after the cargo was discharged at Key West, it did not receive any damage, but was benefited, if anything. I do not consider Key West a good market for wire of that description, because there is no demand for it. I considered the cargo was benefited because that portion of it stowed on the dock received the benefit of several heavy rains which washed the salt water out of it.

Cross-examination:

I have simply seen wire in fences on mainland. The opinion that I have given was arrived at by an examination for the purpose

of arriving at the amount of damage; the examination was mad at the time it was coming off of the vessel. I saw almost ever bale. I was down there five or six times a day.

Q. Did you make an examination of this cargo with a view of as certaining the actual damage it received, in order to base an opinio thereon?

A. I answer yes to that; to base a general opinion on. I was no an appointed appraiser; I was not connected in such a manner wit the salvage suit as to make it necessary for me to ascertain the dam age of that cargo. I did not keep account of the bales as they cam out of the vessel. I do not think I had an attachment of all th cargo before it was discharged at this port. I made no account examination for the purpose of attachment. I got number of bal from consignee's account. The examination I say I made wa made before and after I got attachment. I think I saw pretty ne the whole cargo as it was discharged from the vessels and as it wa piled up. I did not go down each day and remain there durin the discharging of this cargo in working hours continuously. would go down there during the discharging of the cargo five six times a day, and remain there about fifteen or twenty minut each time. The galvanized wire was stained a little, but I did n notice any rust on it. The other wire was not rusted when it fir came out, but was stained black and would rust afterward

93 The damage of thirty per cent. that I have testified abou to the wire, consisted, considerable of it, in the wire comi unrolled, ugly bunches and mashed, and being wet by the sa water.

Direct examination resumed:

The wire did not come loose in a greater portion of the carg My fee as United States marshal depended on the amount of salva awarded by the court, as I was interested to the extent in determi ing the value of the cargo. I had an attachment on all of t cargo, and had it in my custody and examined it all before it w reshipped. My examination was as I have stated.

PETER A. WILLIAMS.

Deposition of John W. Sawyer.

Taken in Key West, May 21, 1895.

My name is John W. Sawyer; I am forty-seven years of ag my residence is Key West, Fla.; I am a merchant of Key We Fla. I remember the schooner Benjamin Hale and cargo. I w appointed by the United States district court as an appraiser in salvage suit against schooner Benjamin Hale and cargo, for purp of appraising value of schooner Benjamin Hale and cargo, abo the 16th of May, A. D. 1893. I made a careful examination of t cargo that was ashore. I was the greater part of the day maki the examination. The cargo had not all been discharged at t time; there was a small amount remaining on board. The ca

consisted of barbed wire fencing, lot of copper wire, and a lot of hay-binders. I examined the cargo also that was left on board the schooner after it was taken off. The greater part of the cargo consisted of galvanized iron barbed wire. In placing the value of the cargo, I was governed by price-lists of the value of the cargo at the time, and ascertained the damage to the cargo by examination. I did not consider the galvanized iron wire much damaged; the painted wire was damaged. Some portions of the wire were not damaged at all. I thought at the time, and think now, that thirty-five per cent, was the whole amount of damage to the cargo taken as a whole.

94 Cross-examination:

I am a clothing merchant, also vessel-owner. This wire was stored on skids near dock of Taylor & Curry. It was piled one bundle on another, eight or ten feet high; the balance was in warehouses. The examination I made at the time was not to ascertain the damage, but to find out the then value of cargo.

JOHN W. SAWYER.

Deposition of James St. Clair.

Taken in Key West, May 16, 1895.

My name is James St. Clair; I am thirty-four years of age; my residence is in Key West, Fla. By occupation I am a pilot. At present I am master of the pilot-boat Rapid, belonging to the port of Key West, Fla. In the month of April I was pilot and master of the pilot-boat Nonpareil. The Nonpareil was also at that time a licensed wrecking schooner. As master of the licensed wrecking schooner Nonpareil I was engaged at the wreck of the schooner Benjamin Hale. It was in the latter part of the month of April, 1893, that I went to the wreck of the schooner Benjamin Hale. I went down to Tortugas and found the schooner Benjamin Hale ashore and offered my assistance. I found that she was loaded with a cargo of barbed and other wire. She was ashore on Bird Key shoal, near Tortugas. When I arrived there she had been ashore about three or four days. I do not remember the exact day I arrived there. It was somewhere around the 21st or 23d of April. It was in the evening. I then offered my assistance to the master, and the same was accepted. I could not do anything that night, as there was a good sea running there, and I could not get my vessel alongside of her. I took the master off then and took him into Tortugas harbor. I spent the night in Tortugas harbor. That night I made a consortship with the wrecking schooner Foam of the Sea for her to assist me with the wreck. The next morning I went out and took the captain out to the Benjamin Hale, with what men I could get at Tortugas. I sounded around the vessel and
95 found out how much water there was around her, and sounded her pumps and tried them. I found that the vessel was hard and fast ashore, and we could not find that we made any

impression on the pumps. I concluded that the vessel was bilged, and commenced to save cargo. This was done at the request of the master.

I loaded my vessel, the Nonpareil, with wire, and carried the same to Tortugas harbor and discharged the same ashore. I carried the first load about 450 bundles of wire. I went back again and loaded my vessel and carried the load into Tortugas. I took in, in all, into my vessel, and discharged at Tortugas, about 850 bundles of wire. I discharged this wire at the Buoy dock at Tortugas and stored it in the Government shed. It had not been wet in any way. It was not wet or damaged in any way after it was at Tortugas. It was stored in Tortugas from three to four weeks. I then sent the schooners Nonpareil and Foam of the Sea to Tortugas, and they brought all of this wire that I had stored there up to Key West. It was then discharged at Taylor & Curry's wharf. It was then dry and in good condition. There was about 3,000 bundles of wire, in addition to that which was landed at Tortugas by the Nonpareil, put on the wrecking vessels and brought up to Key West. This 3,000 bales that I speak of, in addition to that which was landed at Tortugas, was dry. I know that this cargo was discharged at Taylor & Curry's wharf. It was dry when put aboard the vessels. I saw a part of this cargo being put into the warehouse after I came up to Key West, and it was dry. Most of this cargo that was taken out was galvanized wire; some of it was painted. I don't suppose over two per cent. was painted. Here and there there was an odd painted bundle. We had no painted wire on the Nonpareil. The remainder of this cargo was brought up in the schooner Benjamin Hale to Key West. It was all taken out of the Benjamin Hale and discharged at Taylor & Curry's wharf. Of these that remained in the vessel, I think about thirty-five or forty per cent. was wet. There was lots of the cargo in amidships and aft, that the water could not get at at all, and some of it was only partially wet. The greater portion of this cargo that had been wet was galvanized wire. Most of the cargo in the vessel was galvanized. I saw all of the cargo after it was landed and stored in Key West, that is, with the
96 exception of a few bales which fell overboard. None of this cargo received any damage after it arrived in Key West.

While I was at Tortugas trying to get the Benjamin Hale off the shoal, it became necessary to jettison a portion of her cargo. We had taken the steam pump off the schooner Cora, and the only place that we could get the suction hose of the pump into was in the main hatch. Before I could get the suction hose into the hatch there was a lot of this hay-binding wire laying right there, and I had to get clear of it. The Cora was alongside the main hatch and her decks were lumbered up and I could not put it aboard of her. I could not bring any vessels alongside at that time to put the wire on, because it was too rough. I had to get the suction hose down and I threw some of this wire overboard. The cargo that I jettisoned was hay bands. I think between eighty and one hundred bundles; I think not more than eighty bundles. This was the only cargo that I know of that was jettisoned at Tortugas. The Benjamin Hale

and the cargo which remained aboard was towed to Key West by the steamtug Clyde. I never had any experience with barbed wire of this class, but I have with ordinary galvanized wire. I suppose that all galvanized wire is about the same thing. I have been in vessels that had galvanized wire rigging for about the last twenty years, and had experience in handling it. From my experience I should consider that the whole cargo of the Benjamin Hale was damaged from fifteen to twenty per cent. in value. I know that this cargo was shipped from Key West in the schooner Cactus, to Velasco, Texas. I did not see it reshipped. I saw the schooner at the wharf and saw them loading her.

Cross-examination by G. BOWNE PATTERSON:

When I went aboard this vessel, aft she was drawing about fifteen feet ten, and forward she was drawing about nine feet, and right abreast the main hatch she was drawing about twelve or twelve and one-half feet of water. The shoal sloped gradually up. This vessel was about a foot and one-half ashore aft. She was buried in the sand about a foot and a half. I thought she was bilged when I got there. I could make no impression on the pumps with the hand force that I had there. When I first sounded the pumps in this vessel abaft of the main hatch near the after-pump wells, I
97 found about twelve and one-half feet of water in her. These were the after-pump wells near the mizzenmast. I could not sound the forward pump or the amidships pump. You could not see the water forward at all, but you could in the main hatch. This twelve foot six is the greatest depth of water that we found in the vessel at any time while ashore. The water could not go any higher in the vessel than it was outside. It went at twelve foot six in at high-water mark. It would ebb and flow in the vessel. I did not take all of the dry cargo out of her that I could before getting her off. When we took cargo out of the vessel before getting her off there was no evidences of that we took out being wet any. From the time that we commenced taking cargo out of the vessel until we floated her was about six days; it might have been six days. Of the three thousand bales of wire that we took out of the Benjamin Hale, in addition to that landed at Tortugas, none of it was wet. The reason that we did not take out any more cargo than this was that when we got the steam pump to work on the vessel we began to shoal the water and found that we could get the vessel off without taking out any more. We put the pump in the main hatch. We could see the water in the main hatch of the vessel when I put the pumps in. The water came up in the main hatch to within the between-deck beams, and gradually grew less as it went forward. We cleared out the main hatch down to the kelson of the vessel to get the pumps down. The first wire that we took out was hay bands. We took out between eighty and one hundred bundles of these, and threw them overboard. We threw them overboard because there was no deck-room to put them on.

This was the only reason for throwing them overboard, because I

had no place to put it; it was partly damaged, and I did not think it was much account either. I was one of the libellants against the schooner Benjamin Hale for salvage, and a witness in the U. S. district court at Key West in the case. I did testify at the hearing of this case of the Benjamin Hale in that court, that the wire that I took out of the hatch and threw overboard I considered utterly worthless, and that it was so rotten that it would break in pieces. I did not throw all of the wire, that I took out of the hatch to clear or the pumps, overboard, only those hay bands. These hay
98 bands were stowed lengthwise in the hatch, and they had sagged down in the water and the ends stuck up. I considered them worthless; where they had touched the water they were rusty, and some of them in the handling broke in two. The other wire, galvanized, that I took out of the main hatch and did not throw overboard, I did not consider very much damaged. I did not notice any marks of rust on this cargo that was taken out of the main hatch, except that *that* I threw overboard. We took the cargo of the vessel after we commenced to put the pumps down, except that included in the three thousand bales that I have testified to. When we floated the vessel the water was about one foot above the kelson when she started to start astern on us.

After we hove the vessel off that night we held her to her anchors, as there was a gale of wind blowing. We held on there till next morning when the steam pump broke down. We kept the water down to within about a foot of the kelson until about four o'clock in the morning, when the pump broke down. We then started the hand pumps, but the water increased to about six feet, and then we got the steam pumps to work again. We pumped her out again until the water was about level with the kelson, until about eleven or twelve o'clock that day, when the pump broke down again. And the pump kept breaking down off and on till the next morning about six o'clock, and the water never got over seven or eight feet deep in the vessel and we never lowered it during that time to more than about within one foot of the kelson. The next morning the pump broke down again, and then the steamtug Clyde came alongside, and there was then about seven or eight feet of water in her hold. We then pumped her out with the Clyde's pump and took her into Tortugas harbor that day. She remained at Tortugas harbor three or four days before we brought her to Key West, and during that time the Clyde would stay alongside of her and pump her when necessary. The greatest depth of water that we had in the vessel at any time after she floated was probably nine or ten feet. The pumps would break down sometimes and the water would increase, and then we would fix pumps and pump her out again. It took about thirty hours from the time we left the wharf at Tortugas to bring the vessel to Key West.

99 Coming up from Tortugas to Key West, when the Benjamin Hale would get about six feet of water we would bring the Clyde alongside and pump her out.

I saw most of the cargo that was taken out of the Benjamin Hale at Key West. I examined it as I saw it coming out, for my own

personal satisfaction. I did not see every package of wire as it came out of the vessel; I saw all of it that came out, but I did not personally examine every bale as it came out. I saw every bundle that went into the warehouse. I did not make a personal examination of each bundle to ascertain the damage that each bundle had sustained. But when the wire was being taken out of the vessel and being put in the warehouse, I was pretty much all the time between the warehouse and the vessel, and those bundles that I did not see come out of the vessel I saw stowed in the warehouse. My examination consisted of looking on when I was on the vessel while the wire has being hoisted out, and of being on the wharf or in the warehouse when it was being stored, where I could see it. I made no examination of that cargo at any time with a view to testifying as to how much damage it had sustained. I first arrived at the opinion that the cargo had received damage from fifteen to twenty per cent. when the salvage that was decreed. I based this opinion on the amount that the judge decreed on the vessel and cargo.

Direct examination resumed:

When I saw the cargo being discharged from the Benjamin Hale while I was on the vessel and on the wharf, I was near enough to see whether it was damaged or not. It was to my interest as a salvor to examine the cargo and see how much it was damaged. When these pumps would break down as I have testified to, and the water would increase in the hold as I have testified, this depth of water would continue in the hold, sometimes longer and sometimes shorter, all the way from one hour and one-half to two hours and a half. She did not leak so badly after she was repaired at Tortugas.

JAMES ST. CLAIR.

100 *Deposition of John Jay Philbrick.*

Taken in Key West, May 21, 1895.

My name is John Jay Philbrick; I am fifty-five years of age; my residence is Key West, Fla.; I am a shipping and commission merchant, and agent of the Southern Pacific Company at Key West, Fla. I remember the schooner Benjamin Hale and cargo. I was appointed by the United States district court as an appraiser in a salvage suit against schooner Benjamin Hale and cargo, for purpose of appraising the schooner Benjamin Hale and cargo, about the sixteenth day of May, A. D. 1893; I, as such appraiser, made a careful examination of the cargo that was ashore. We were the greater part of the forenoon making an examination of the cargo, about three or four hours. The cargo had not all been discharged at that time; there was a small amount left on board the schooner, I do not remember how much now; we were told the amount at the time by the consignee. The cargo consisted largely of barbed-wire fencing; there was a quantity of copper wire also, and a quantity of binding

wire for hay, I mean hay-binders. I did not examine what cargo was left on board the schooner Benjamin Hale. The greater quantity of the cargo consisted of galvanized iron barbed wire. I have never had any experience in buying galvanized iron wire, but have carried in our ships as freight. I use galvanized iron wire as guy wires for electric poles, and as supporting wires for the arc lights in the electric light company. From my experience in use of galvanized wire, and from an examination of the cargo, I would say that the galvanized wire was not damaged materially, and that the painted wire was damaged seriously. The bulk of the damage was in the painted wire; some of the wire was not damaged at all. I should judge that as taking the entire cargo as a whole, that from twenty-five to thirty per cent. would cover the entire damage.

Cross-examination:

I think what use I have had with galvanized wire myself, and what amount of it I have handled for other parties, would enable me to judge fairly of the amount of damage to this cargo. The galvanized wire was stored up in tiers, and the black wire in
101 piles, when I examined it. I examined all the galvanized iron wire that was opened to sight; I walked up and down the tiers. The black wire was piled up in such a way that we could judge very fairly of the quality of it; the other portion of the cargo and more valuable was stored in warehouses. We ascertained the damage of the cargo in the vessel and not discharged, I think, by classing it with the damaged wire on shore. The examination that I made of the cargo was not made for the purpose of determining the damage to the cargo, but for the purpose of determining the then value of the whole cargo.

JOHN JAY PHILBRICK.

Deposition of Peter T. Knight.

Taken in Key West, May 10, 1895.

The said PETER T. KNIGHT, being about the age of forty-three years and having been by me first cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the matter of controversy aforesaid, I did carefully examine the said Peter T. Knight, and he did thereupon depose, testify and say as follows, viz: My name is Peter T. Knight; I am forty-three years of age; I reside at Key West, Fla.; I am deputy collector of customs for the port of Key West. About the first day of May, 1893, I arrived at Key West in a tugboat from Fernandina, and heard that the American schooner Benjamin Hale was ashore at Tortugas. I proceeded in said tug to Tortugas seven o'clock the same evening, where I arrived the next morning at daylight; found that the Benjamin Hale had been hauled off of the reef by wreckers, that she had nine feet of water in her hold, and the wreckers could not pump her out and were about to abandon her and let her go back on the reef. I put

steam pump aboard of her and succeeded in freeing her, then towed her into the harbor at Tortugas where we made some temporary repairs, and then towed her to Key West. About 3,000 bundles of wire, I think, or a little more, were discharged from the Benjamin Hale and brought up to Key West in wrecking vessels; the remainder of the cargo was brought up in the schooner and discharged at Key West on Taylor & Curry's wharf. The cargo from
102 the wrecking vessels was also discharged at the same place.

I saw a great deal of the cargo that was taken out of the Benjamin Hale at Tortugas. All of the cargo taken out of the Benjamin Hale before I got there was in good order; there was none taken out before I got there. Some of the cargo that remained in the Benjamin Hale was under water when she arrived at Key West; some of it was dry. I should say that there was a very small portion of the cargo under water when we arrived at Key West, as we had been keeping the pumps up. I think about one-tenth of the cargo that remained in the schooner had been submerged; most of the cargo was galvanized iron wire.

The cargo consisted of galvanized iron wire, painted iron wire, hay-binders, and one large roll of steel wire cable. The cargo brought up to Key West was in good condition; it was not damaged at all. The cargo that was in the Benjamin Hale and had not been submerged was all right, in a good condition. The part that was in good condition was stored in the warehouse; this was dry. The remainder was stored on the grounds of Taylor & Curry on boards; the cargo brought up on the wrecking vessels was stored in the warehouse.

Q. Taking the cargo as a whole, what percentage of loss do you think was sustained by this damage, in value?

A. A liberal estimate would place the damage at from twenty-five per cent. to thirty per cent. I think that this cargo was not damaged in any way after its arrival at Key West; it might have been damaged by handling it, in putting it on board, very slightly. I had contract to stow, to reship this cargo, and handled the whole of it. It was reshipped on the schooner Cactus. I personally superintended the work and handled lots of the bundles of wire myself. I saw it all put on board myself. Key West is not a market for the sale of barbed wire. The cargo left Key West in June, 1893; the cargo when reshipped was apparently in good order. When I say the cargo brought up to Key West was in good condition and not damaged at all, I mean the cargo brought up in the wrecking vessels.

Cross-examination:

The cargo that had been taken out of the Benjamin Hale at Tortugas when I arrived there was in the wrecking vessels. When
103 I say that the hold of the vessel had nine feet of water in her, it was after this cargo in the wrecking vessels had been taken out of her. About one-fifth of the Benjamine Hale's cargo was taken out of her by the wrecking vessels; this was dry cargo. I arrive

at the conclusion that one-tenth of the cargo was submerged, by observation and not by figures.

Q. When you say that twenty-five per cent. or thirty per cent. is a liberal estimate of the damage of the entire cargo, is this based on a careful examination and figures, or is it a mere estimate of yours?

A. It is not based on any figures, but from my knowledge, knowing that galvanized iron does not receive much damage from being submerged for a short time in salt water. I have never had any experience with any cargoes of this kind of wire, but I have had experience with galvanized wire being used on vessels for wire rigging and bobstays for vessels.

PETER T. KNIGHT.

Deposition of Ben. Blum, a Citizen of Galveston, Texas, Witness for Defendant, Taken April 30, 1895.

Q. 1. Are you a member of the firm of Ben. Blum & Company, of Galveston, Texas?

A. I am the senior member of that firm.

Q. 2. Are you in the hardware business?

A. I am.

Q. 3. Please state what experience you have had with barbed wire as a dealer, for how many years have you bought and sold it, and are you familiar with the quality and market price of barbed wire.

A. I have handled barbed wire for ten or eleven years, and I am familiar with the market price of it and quality.

Q. 4. On or about Sept. 20, 1893, did you attend a sale by the United States marshal for the eastern district of Texas, of barbed wire, smooth wire, and staples, at Velasco, in Brazoria county, Texas, discharged by the schooner Cactus?

A. I attended such a sale at that time and at that place, but I cannot tell what schooner discharged it.

Q. 5. Do you, or not, know who purchased said cargo of barbed wire, and if so, was it sold by the ton, or by the reel, or in bulk?

A. I do. It was sold in bulk.

104 Q. 6. Who purchased the cargo of barbed wire? How much money did you pay for the same, and to whom did you make the payment?

A. Ben. Blum & Company purchased said cargo, and paid ten thousand dollars for it to the United States marshal.

Q. 7. Were you familiar with the price of wire in Galveston and Houston on or about Sept. 20, 1893?

A. I was familiar.

Q. 8. What was the market price in Houston and Galveston, if you know, for wire the same as sold, per reel and per ton, in good condition, on or about Sept. 20, 1893?

A. I do not remember accurately, but my best recollection is that it was between $2.40 and $2.75 per one hundred pounds, in car-load lots.

Q. 9. At what average price per pound did you sell the wire above referred to?

A. The average price per pound would be between one cent and one cent and one-half.

Q. 10. How many pounds would the reels above referred to average?

A. From ninety to one hundred and twenty-five pounds each reel.

—. Were there, or not, many bidders at the marshal's sale of said wire at Velasco, Texas?

A. I do not know.

Q. 11. State, if you know, whether or not there were other bids besides your own for said wire at the time of said sale; give the amount of said bids.

A. The bids started at $100 and reached $8,000 before I bid, and after $9,800 had been bid, I bid $10,000 and it was knocked down to me. I did not know at the time the names of any of the bidders.

Q. 12. Do you, or not, know who were the consignees of said cargo of barbed wire, and if yea, give their names and place of residence?

A. I do not know the names of the consignees of said cargo, but the wire was marked, "Washburn and Moen Manufacturing Company, Houston, Texas."

Q. 13. Were you, or not, connected in any way or related in business with the consignees of the said barbed wire?

A. I was not.

Q. 14. Have you, or not, sold said wire, and if so, have you received any complaints as to the quality of said wire, or as to its being damaged, and if so, state the nature of said complaints.

A. We have sold that wire for damaged and have received a great many complaints.

Q. 15. As a practical hardware merchant, are you familiar
105 with the markets in Houston and Galveston for wire same as sold at Velasco, and if so, state whether or not said wire would have sold better at Houston, Texas, than at Velasco, taking into consideration the cost of shipping said barbed wire from Velasco to Houston.

A. I cannot say.

Q. 16. State, if you know, to what extent in percentage was said cargo of wire damaged for practical use when you bought it.

A. I cannot say.

Q. 17. How much profit in round figures did you make on the purchase of said wire?

A. I decline to answer this question.

Q. 18. To what extent, per cent., did the wire become damaged from the time it was landed by the Cactus until it was sold?

A. I did not see it when it was landed and therefore I cannot say.

Cross-examination:

X Q. 19. Did you go to Velasco about the first of September, 1893

for the purpose of examining the cargo of wire which you subsequently purchased?

A. I did.

X Q. 20. State the character of examination you made of the cargo.

A. I made a careful examination of all the goods, spending several hours for that purpose.

X Q. 21. Did you make that examination with a view to ascertaining the amount of the damages to the goods examined, and the market value of the goods in their damaged condition?

A. I did.

X Q. 22. From your examination, please state, in detail, what you considered the amount of damage to the market value of the goods. In other words, what per cent. were the goods damaged in?

A. The barbed wire and the plain wire were damaged from sixty-five to seventy-five per cent. The staples and the wash lines were in good condition. Also wire rope was in good condition. Insulated wire was damaged from fifteen to twenty-five per cent. The hay ties were damaged about ten per cent.; the annealed wire was damaged from sixty to seventy per cent. The total average damage to the cargo I estimate at about seventy to seventy-five per cent.

X Q. 23. What per cent. of the cargo purchased by you have you sold?

A. I don't remember the per cent., but have on hand about two car-loads of the stuff.

106 X Q. 24. Is it not a fact that what is left is very badly damaged?

A. Yes.

X Q. 25. Is it not a fact that you sold the goods as damaged and so represented them to your customers, and sold frequently by sample or on inspection? Explain fully.

A. We sold it for damaged wire or on inspection. We did not sell by sample.

X Q. 26. Did you receive any complaints from your customers to whom you sold the wire, notwithstanding that you represented it as being damaged at the time you sold it?

A. We have.

X Q. 27. Did you receive many complaints or few, and of what character were they?

A. We had lots of them. Some complained of it being rusted; some complained of breakage when being put up, and they complained generally when they came to pay the bill.

X Q. 28. Is there any difference in the market value of goods sold in bulk, of the character and quantity you purchased at the sale heretofore inquired about, and the market value of the same class of goods when sold in small quantities to suit purchasers, and if so, what is the difference; that is, how much do you estimate it, and which sale would be the highest market value?

A. There is a great deal of difference. The higher market is secured when sold in quantities to suit the purchaser.

X Q. 29. At what per cent. of its value, from your experience, do

ou estimate that goods of the character and quantity purchased by ou, can be handled and sold to the trade in quantities to suit the urchaser?

A. A little over twenty-five per cent.

07 EXHIBITS.

EXHIBIT 1.

Cargo. No. 200.

The Reliance Marine Insurance Company, Limited.

Washburn and Moen Mfg. Company, on account of whom it concerns,

n case of loss to be paid to said company, do make insurance nd cause wire to be insured, lost or not lost, at and from Boston to Galveston *and/or* Velasco, upon all kinds of lawful goods and merhandises laden or to be laden on board the good schooner called the Benjamin Hale —— —— whereof is master for this present voyage, or whoever else shall go for master in the said vessel, or by whatever other name or names the said vessel, or the master thereof, is or shall be named or called.

Beginning the adventure upon the said goods and merchandises, rom and immediately following the loading thereof on board of the said vessel, at —— as aforesaid, and so shall continue nd endure until the said goods and merchandises shall be safely anded at —— as aforesaid. And it shall and may be lawful or the said vessel, in her voyage, to proceed and sail to, touch and tay at, any ports or places, if thereunto obliged by stress of weather r other unavoidable accident, without prejudice to this insurance. The said goods and merchandise hereby insured are valued (premium included) at sum insured.

Touching the adventures and perils which the said assurers are ontented to bear and take upon themselves in this voyage, subject s hereinafter provided, they are of the seas, men-of-war, fires, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, reprisals, takings at sea, arrests, restraints and detainments of ll kings, princes or people, of what nation, condition or quality oever, barratry of the masters and mariners, and all other perils, osses and misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandises, or any part thereof. And in case of any loss or misfortune, it shall be 08 lawful and necessary to and for the assured, their factors, servants and assigns, to sue, labor, and travel for, in and bout the defence, safeguard and recovery of the said goods and merhandises, or any part thereof, without prejudice to this insurance; or shall the acts of the insured or insurers in recovering, saving nd preserving the property insured, in case of disaster, be considred a waiver or an acceptance of an abandonment; to the charges hereof, the said assurers will contribute according to the rate and uantity of the sum herein insured; having been paid the consid-

eration for this insurance, by the assured or — assigns, at and aft
the rate of, as indorsed, one and one-fourth per cent.

The assurers are to be entitled to premiums at their usual rate
all shipments reported or not. It is warranted by the assured
report every shipment on the day of receiving advices thereof, or
soon thereafter as may be practicable, when the rate of premiu
shall be fixed by the assurers.

And in case of loss, such loss to be paid in thirty days after pro
of loss, and proof of interest in the said — (the amount of t
premium, if unpaid, being first deducted), but no partial l
or particular average shall in any case be paid, unless amou
ing to five per cent., provided always, and it is hereby furth
agreed, that if the said assured shall have made any other assura
upon the premises aforesaid, prior in day of date to this policy, th
the said assurers shall be answerable only for so much as the amou
of such prior assurance may be deficient toward fully covering t
premises hereby assured; and the said assurers shall return t
premium upon so much of the sum by them assured as they sh
be by such prior assurance exonerated from. And in case of a
insurance upon the said premises, subsequent in day of date to th
policy, the said assurers shall nevertheless be answerable, subject
hereinafter provided, for the full extent of the sum insured by th
policy, without right to claim contribution from such subseque
assurers, and shall accordingly be entitled to retain the premiu
by them received, in the same manner as if no such subseque
assurance had been made. Other insurance upon the premi
aforesaid, of date the same day as this policy, shall be deem
simultaneous herewith; and the said assurers shall not
109 liable for more than a ratable contribution in the proporti
of the sum by them insured to the aggregate of such sim
taneous insurance. It is also agreed that the property be warrant
by the assured free from charge, damage or loss, which may ar
in consequence of a seizure or detention, for or on account of a
illicit or prohibited trade, or any trade in articles contraband
war.

Warranted not to abandon in case of capture, seizure or det
tion, until after condemnation of the property insured; nor un
ninety days after notice of said condemnation is given to the assure
Also warranted not to abandon in case of blockade, and free fr
any expense in consequence of capture, seizure, detention or bloc
ade, but in the event of a blockade to be at liberty to proceed to
open port and there end the voyage.

And the assurers are contented, and do promise and bind the
selves to the assured, their executors, administrators or assigns,
the true performance of the premises, for the amount herein
sured.

In witness whereof, the undersigned, on behalf of the said
liance Marine Insurance Company, Limited, has hereunto set
hand in New York, the fifteenth day of March, 1893.

MEMORANDUM.—It is also agreed that bar, bundle, rod, h
and sheet iron, wire of all kinds, tin plates, steel, madder, sum

wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flaxseed and bread are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent., unless general.

Warranted by the insured free from damage or injury, from dampness, change of flavor, or being spotted, discolored, musty or mouldy (except caused by actual contact of sea water with the articles
110 damaged), occasioned by sea perils. In case of partial loss by sea, damage to dry goods, cutlery or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandises as far as practicable. Not liable for leakage on molasses or other liquids unless occasioned by stranding or collision with another vessel.

If the voyage aforesaid shall have been begun, and shall have terminated before the date of this policy, then there shall be no return of premium on account of such termination of the voyage.

In all cases of return premium, in whole or in part, one-half per cent. upon the sum insured is to be retained by the assurers.

$48,800. Forty-eight thousand eight hundred dollars.

HENRY DESPARD, *Attorney.*

This policy is not valid until countersigned by Edmund A. Poole, agent at Boston.

EDMUND A. POOLE, *Agent.*

(Margin.)

Proof of loss to be authenticated by the agent of the company, if there be one at the place such proofs are taken, or in case there be none, by the correspondent of the National Board of Marine Underwriters of New York.

Cargo on deck free from claims or loss by wet, breakage, leakage, or exposure.

The assurers not to be liable under this policy for more than $— by any one vessel, at one time, unless otherwise agreed upon at the time of indorsement.

Proof of loss to be authenticated by the agent of the assurers, if there be one at the place such proofs are taken.

Warranted by the assured free from claim on account of capture, seizure, detention or destruction, by or arising from any belligerent nation or by or from any officer, civil or military, or other person

claiming to act in their name or under their authority, or in their behalf.

111 This policy to be deemed continuous, and to cover as above until discontinued by either party or giving the other — days' notice.

Free of particular average, but liable for absolute total loss of a part if amounting to five (5%) per cent.

Sum insured	$48,800
Premium	616

EXHIBIT 2.

WORCESTER, MASS., *April* 29, 1893.

Edmund A. Poole, Esq., ag't Reliance Insurance Co., Boston, Mass.

DEAR SIR: Understanding that the schooner Benjamin Hale is a total loss, we hereby abandon to the Reliance Insurance Company all right, title, and interest in and to the cargo of wire shipped by her from Boston to Velasco, as per certified invoice and bill of lading enclosed.

Yours truly, WASHBURN & MOEN MFG. CO.

EXHIBIT 3.

WORCESTER, MASS., *April* 29, 1893.

Reliance Insurance Co.—Washburn & Moen Manufacturing Co.

13,051 reels barb. wire, 1,367,870 lbs. at 2.90 cwt.	39,668.23	
641 kegs gal. staples, 64,100 lbs. at 2.60 cwt.	1,666.60	
1,102 bdls. gal. & ann'l'd wire	2,472.22	
1,050 " bale ties	1,600.55	
1 reel gal. wire rope	133.29	
15 bbls. clo. line wire	311.54	
5 reels salamander wire	301.29	
		46,153.72
Add 5%		2,307.68
F'g't from Worcester to ship side		416.34
		48,877.74

Am't covered as per policy, $48,800.00.

112 EXHIBIT 4.

Shipped, in good order and condition, by Washburn & Moen Mfg. Co. on board the good sch. called the Benjamin Hale, whereof John Hall is master for this present voyage, now lying in the port of Boston and bound for Velasco, Texas, to say:

(13,051) thirteen thousand and fifty-one reels of barbed wire.

(1,102) eleven hundred and two bundles of plain wire.

(5) five reels of salamander wire.

(1) one reel of rope.

(1,050) one thousand and fifty bundles of hay bands.
(15) fifteen barrels of wire.
(641) six hundred and forty-one kegs staples.
Weights and contents unknown, not accountable for leakage, breakage, or rust,

Being marked and numbered as in the margin, and are to be delivered in like good order and condition, at the aforesaid port of Velasco (the danger of the seas and fire only excepted) unto Washburn & Moen Mfg. Co., Houston, or to assigns, he or they paying freight for the said goods, freight and conditions as per charter-party less (700) seven hundred dollars advanced in Boston with primage and average accustomed.

In witness whereof, the master of the said vessel hath affirmed to three bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

Dated at Boston, March 29, 1893.

JOHN HALL.

(Margin.)

Captain to telegraph to Washburn & Moen Mfg. Co., Houston, Texas, immediately upon arrival of the vessel at Velasco. Weight 710 gross tons.

113 EXHIBIT 5.

5 Papers.

(1.)

WORCESTER, MASS., *March* 15, 1893.

Washburn & Moen Mfg. Co., Houston, Texas, bought of Washburn & Moen Manufacturing Co.

		M.		
3 reels, 4,025 ft.	A # 12	salamander	at $72 per ft.	$289.80
1 " 1,143 ft.	B # 6	"	160 "	182.88
1 " 1,410 "	B # 14	"	50 "	70.50
				$543.18
Less 45 & 2%				251.89
				$291.29
5 reels at $2				10.00
5 reels weight 585 lbs.				$301.29

Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN.

(2.)

MARCH 15, 1893.

Washburn & Moen Mfg. Co., Houston, Texas, bought of Washburn & Moen Mnfg. Co.

1 reel, 1,310 lbs., 1¼ galv. wire rope at 18c. ft., less 45%	$133.29
9 bbls., 2,246 lbs., 20 galv'd C. lines, 90 doz., at $2.10 doz.	189.00
4 bbls., 910 lbs., 18 galv'd C. lines, 19 doz., at $3.41 D.	64.79
2 bbls., 472 lbs., 19 galv'd C. lines, 21 doz., at $2.75 D.	57.75
	$444.83

Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN, *Treas.*

114

(3.)

WORCESTER, MASS., *March* 15, '93.

Washburn & Moen Mfg. Co. bought of Washburn & Moen Manufacturing Co.

200 bdl.,	#15	S. eye	bale ties,	8 ft	at $4.27	bdl.			$854.00
300 "	#15	"	"	8 " 3 "	$4.39	"			1,317.00
300 "	#15	"	"	8 " 6 "	$4.51	"			1,353.00
100 "	#16	"	"	8 " 3 "	$4.10	"			410.00
100 "	#16	"	"	8 " 6 "	$4.20	"			420.00
50 "	#16	"	"	9 " "	$4.38	"			219.00
									$4,573.00
Less 65%									2,972.45
									$1,600.55

1,050 bdls. Weight 31,020 lbs.
Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN.

(4.)

WORCESTER, MASS., *March* 15, 1893.

Washburn & Moen Mfg. Co. bought of Washburn & Moen Manufacturing Co.

13,051 reels, 1,367,870 lbs., barb. fence at $2.90 cwt.	$39,668.23
641 kegs, 64,100 " staples at $2.60 cwt.	1,666.60
	$41,334.83

Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN.

115 (5.)

MARCH 15, 1893.

Washburn & Moen Mfg. Co. bought of Washburn & Moen Mfg. Co.

405 bdls.,	40,414 lbs.,	# 12 galv'd fence at	$2.85 cwt.....	$1,151.79
173 "	10,035 "	14 " " "	2.90 "	291.01
100 "	6,300 "	14 ann'l'd C. "	2.80 "	176.40
200 "	12,600 "	16 " " "	2.80 "	352.80
100 "	6,300 "	15 " " "	2½c. lb.....	157.50
14 "	882 "	18 galv'd C. met. "	4c. lb.. ...	35.28
25 "	1,575 "	19 " " " "	2½c. lb.....	157.50
83 "	5,355 "	15 ann'l'd C. "	$2.80 cwt.....	149.94
				$2,472.22

1,102 bdls.
Certified correct.

WASHBURN & MOEN MFG. CO.,
By PHILIP W. MOEN.

EXHIBIT 6.

The Reliance Marine Insurance Company (Limited), of Liverpool, England.

BOSTON, MASS., *May* 1, 1893.

The Washburn & Moen Mfg. Co., Worcester, Mass.

GENTLEMEN: Your favor of the 29th ult. at hand with enclosures as stated, contents duly noted, thanks.

I hereby decline to accept the abandonment of the cargo of wire shipped on board schooner Benjamin Hale as tendered in your books of above date.

I await protest for particulars after receipt of which can judge better regarding the loss.

Very truly yours, EDMUND A. POOLE, *Ag't.*

116 EXHIBIT 7.

Fitz Bros. & Co., ship brokers, Boston.

This charter-party, made and concluded upon in the city of Boston the seventh day of March, 1893, between Capt. John Hall of the Sch. Benj. Hale, of Newburyport, of the burthen of 567 tons, or thereabouts, register measurement, now lying in the harbor of Portland of the first part, and Washburn & Moen Manufacturing Co., of Worcester, Mass., of the second part witnesseth:

That the said party of the first part agrees on the freighting and chartering of the whole of the vessel (with the exception of the cabin and necessary room for the crew, and storage of provisions, sails and cables) or sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Boston, Mass., to Velasco, Texas, on the terms following: The said vessel shall be tight, staunch, strong, and every — fitted for such a voyage,

and receive the board during the aforesaid voyage, the lawful merchandise hereinafter mentioned. The said party of the second part doth engage to provide and furnish to the said vessel at Mystic wharf, Boston, a full cargo under deck of barbed and plain wire on reels in kegs and barrels, and to pay said party of the first part, or agent, for the use of said vessel during the voyage aforesaid ($2.25) two dollars and twenty-five cents per ton of 2,240 lbs. delivered at railroad wharf, Velasco. It is understood there shall be no wharfage charge to vessel at place of loading at Boston; and that the vessel be in the berth at Mystic wharf to load on or before Tuesday, March 14th, 1893.

It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the captain reports himself ready to receive or discharge cargo. The vessel to receive quick dispatch loading at Boston and discharging at Velasco.

And that for each and every day's detention by default of said party of the second part, or agent, fifty dollars per day shall be paid by the party of the second part, or agent, to said party of the first part or agent. The cargo or cargoes to be received and de-
117 livered alongside, within reach of the vessel's tackles, and as above, where there is 15 feet of water.

The dangers of the seas mutually excepted.

A commission of 5 per cent. upon the gross amount of this charter, and demurrage, payable by the vessel, is due to Fitz Brothers & Co. upon the signing thereof.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators, and assigns, and also the said vessel's freight, tackle, and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated amount of this charter; and the vessel holding a lien on the cargo for freight and demurrage.

In witness whereof we hereunto set our hand the day and year above written.

JOHN HALL.
WASHBURN & MOEN MFG. CO.
PHILIP W. MOEN,
Treas. & Gen. Mgr.

Signed in the presence of—
PHILIP FITZ to J. H.

This is a true copy of the original party in our possession.
FITZ BROS. & CO.

EXHIBIT 8.

KEY WEST, FLA., *Ap'l* 24, 1893.

To W. & M.:

Hale ashore Tortugas, full water, badly broken up. Think total loss.

JOHN HALL.

EXHIBIT 9.

STATE OF FLORIDA, } ss:
County of Monroe, }

By this public instrument of protest, be it known unto all whom it may concern that on this 24th day of April, A. D. 1893, before me, Charles J. Curry, a notary public, in and for the county
118 of Monroe, and State of Florida, by letters patent under the great seal of the State, duly commissioned and sworn, personally appeared John Hall, captain of the Am. schooner Benj. Hale, of Newburyport, Mass., of the burthen of 567 tons or thereabouts, and said that she sailed in with said vessel on the 31st day of March last, from the port of Boston, with a cargo of barbed wire, bound to the port of Velasco, Texas. Having in due prosecution of said voyage run ashore on Bird Key shoal, Dry Tortugas, which caused his vessel to bilge. He now enters with me the said notary in due form of law, his protest to serve as occasion may require, reserving to himself the right to extend the same in time and place convenient.

JOHN HALL, *Master.*

In testimony whereof the said master has hereunto subscribed his name, and I, the said notary, have to these presents set my hand and seal of office the day first above written.

CHARLES J. CURRY,
Notary Public, Monroe County, Fla.

STATE OF FLORIDA, } ss:
County of Monroe, }

By this public instrument of protest be it known unto all whom it may concern, that on this 24th day of April, A. D. 1893, before me, Charles J. Curry, a notary public, in and for the county of Monroe and State of Florida, by letters patent under the great seal of the State, personally appeared John Hall, master, T. R. McLaughlin, mate, W. P. Wilson, 2nd mate, John B. Brooks, steward, Nils Johansson, James Gilroy, Fred Cheate and Thomas Mitchell, seamen of the Am. schooner Benj. Hale, of Newburyport, Mass., of the burthen of 567 tons or thereabouts, who being duly sworn severally declared on oath (protest having been duly noted before me on arrival) that they sailed from the port of Boston, on the 31st day of March last laden with a cargo of barbed wire, bound for the port of Velasco, Texas, the vessel being seaworthy with sufficient and necessary provisions for the voyage.

119 March 31st.—At 8 a. m. got under way and proceeded to sea, after which nothing of sufficient importance to note occurred until April 15th, 1893.

April 15th.—At 7.45 a. m. ran aground on small shoal not recorded on the chart, Great Isaacs bearing W. ¼ N. 2 miles, Brother Ledges bearing E. by S. ¾ S. ½ mile; 10 a. m. vessel pounding heavily, so ends this day.

April 16th.—All hands at work heaving over cargo to lighten ship,

jettisoned about 200 reels of wire, at 5 p. m. vessel started and went off. At 6 p. m. rounded the Isaacs and started to beat, lights and pumps attended to.

April 17th.—At 11 a. m. passed Gun cay, 2 p. m. jibbed over and hauled across toward the Florida coast, pumps and lights attended to.

April 18th.—At 9 p. m. sighted Carrysford reefs, at 11 passed the lights, pumps and lights attended.

April 19.—At noon passed Sombrero Key light station, 3 p. m. passed Sand Key light station, 8.30 p. m. passed Rebecca Shoal light station. At 11 p. m. ran ashore on the reefs making W. ¼ S. course from Rebecca Shoal light station by the compass, Dry Tortugas light bearing N. W. ¾ W. Garden key N., and that any loss or damage or injury which has arisen or accrued, or that may accrue or be sustained in any manner whatsoever, is solely owing — the accidents and difficulties herein set forth and declared, and not to any negligence, want of skill, vigilence, or exertion on the part of the deponents or any of the officers or men of said vessel; wherefore the said John Hall, master and commander as aforesaid, has requested me to protest, and I the said notary have protested, and by these presents do publicly and solemnly protest, against all any every person and persons whom it may, doth, shall, or may concern, and against all and singular the accidents, casualties, and circumstances already set forth in the foregoing declaration on oath, for all manner of losses, costs, charges, damages, expenses, and injuries whatsoever, which the said ship, and her cargo on board, and the freight by her earned or to be earned, or either of them, or any part thereof, have already sustained, or may hereafter sustain by reason or means of the foregoing premises.

120 In testimony whereof I have hereunto set my hand and affixed my notarial seal.

CHARLES J. CURRY,
Notary Public, Monroe County, Fla.

JOHN HALL, *Master.*
T. R. McLAUGHLIN, 1*st Mate.*
W. P. WILSON, 2*nd Mate.*
JOHN B. BROOKS, *Steward.*
NILS JOHANSSON, *Seaman.*
JAMES GILROY, *Seaman.*
FRED CHEATE, *Seaman.*
THOMAS MITCHELL, *Seaman.*

EXHIBIT 10.

John S. Emery & Co., ship brokers, 154 State street, Boston.

This charter-party, made and concluded upon in the city of Boston, the 14th day of June, 1893, between James B. Drake, agent, of the schooner Cactus of Bath, of the burthen of 508 tons, or thereabouts, register measurement, now lying in the harbor of Key West, of the first part; and John Hall, master Schr. Benj. Hale, of the second part, witnesseth,

That the said party of the first part agrees on the freighting and chartering of the whole of said vessel (with the exception of the cabin and necessary room for the crew, and storage of provisions, sails and cables), of sufficient room for the cargo hereinafter mentioned, unto said party of the second part, for a voyage from Key West to Velasco, Texas, on the terms following: The said vessel shall be tight, staunch, strong and every way fitted for such a voyage, and receive on board during the aforesaid voyage, the lawful merchandise hereinafter mentioned. The said party of the second part doth engage to provide and furnish to the said vessel a cargo consisting of not less than 600 tons gross weight of barbed or smooth wire, and to pay to the said party of the first part, or agent, for the use of said vessel during the voyage aforesaid two dollars and twenty-five cents ($2.25) per ton of 2,240 lbs. delivered freight pay-
121 able in cash upon delivery of cargo. Charterers are to load, stow, and discharge the cargo at their expense, also to pay vessel's wharfage at Key West if any while loading. It is understood that this cargo is from the abandoned Schr. Benj. Hale and is to be taken in the condition which it is, and Schr. Cactus is not accountable for any damage the wire may have sustained.

It is agreed that the lay days for loading and discharging shall be as follows (if not sooner dispatched), commencing from the time the captain reports his vessel ready to receive or discharge cargo, charterers to have seven running days, Sundays excepted, to load vessel at Key West and five running days, Sundays and legal holidays excepted, to discharge at Velasco.

And that for each and every day's detention by default of said party of the second part, or agent, fifty dollars per day shall be paid by said party of the second part, or agent, to said party of the first part, or agent. The cargo or cargoes to be received and delivered alongside, within reach of vessel's tackles.

The dangers of the seas mutually excepted.

A commission of 5 per cent. upon the gross amount of this charter, and demurrage, payable by said vessel, is due to John S. Emery & Co., upon the signing thereof.

To the true and faithful performance of all and every of the foregoing agreement, we, the said parties, do hereby bind ourselves, our heirs, executors, administrators and assigns, and also the said vessel's freight, tackle and appurtenances, and the merchandise to be laden on board, each to the other, in the penal sum of the estimated amount of this charter; and the vessel holding a lien upon the cargo for freight and demurrage.

In witness whereof we hereunto set our hands the day and year above written.

Signed in the presence of—

JAMES B. DRAKE,
Agent for Owners of Sch. Cactus.
JOHN HALL,
Master Sch. Benj. Hale.

This is a true copy of the original charter-party in our possession.
JOHN S. EMERY & CO.

122 EXHIBIT 11.

Sch. Benj. Hale, owners and underwriters, to Wm. Curry, Dr.

To wharfage as follows:

"	12,625 reels barb wire,	33,140 cu. ft., at 2c	$662.80
"	1,146 " plain "	1,528 cu. ft., " "	30.56
"	249 kegs staples, 249	" " " "	4.98
"	5 reels wire rubber, 15	" " " "	.30
"	1 large reel wire rope, 48	" " " "	.96
"	478 bdls. hay straps, 130	" " " "	2.60
"	15 " wire, 75	" " " "	1.50
			$703.70
Material			25.00
			$728.70

Key West, Fla., May 18, 1893.

Rec'd payment,

WM. CURRY,
By C.
JOHN HALL, *Master.*

EXHIBIT No. 12.

badly Dam painted	840	Dam plain	66
Dry "	38	(Annealed)	
Dam barbed	10,448	" tel	572
(hardly perceptible)		Dry "	464
Dry "	951		
	12,277		1,102
B/L. 15 not hurt	13,051		1,102
Bbls. were.	Reels barbed wire.		Bbls. plain wire.

					Badly
Gal. wire	5	Rope	1	Dam keg	6
Dry salamander.		All right.		Dry "	243
	5				249
	5		1		641
	Gal. wire.		Rope wire.		Kegs staples.

Hay bands.	478
	478
	1,050
	Hay band.

123 *Manifest.*

MEMO.—One car-load staples not shipped (got to wharf too late) which probably accounts for difference.

JOHN HALL.

EXHIBIT 13.

KEY WEST, FLA., 7, 1, '93.

Washburn & Moen Mfg. Co., Houston, Tex.

GENTLEMEN: I have been directed by the National Board of Underwriters of New York to forward to you the enclosed b. l. of cargo schooner Cactus, same having greater portion cargo of wrecked schooner Benjamin Hale.

Kindly acknowledge receipt and oblige,

Respectfully, MASON J. MORENO,
Ag't for Underwriters.

EXHIBIT 14.

WORCESTER, MASS., *June* 11, 1895.

Messrs. Carver & Blodgett, 28 State St., Boston, Mass.

DEAR SIRS: The total number of reels of barbed wire shipped by the Benj. Hale was 13,051. Of this, 11,775 were galvanized barbed wire, and 1,276 reels were painted barbed wire. No japanned wire was shipped.

The price of $2.90 was the average price of the two kinds, the price of the galvanized being 3 cents per pound, and of the painted 2½ cents per pound f. o. b. cars Worcester.

Yours truly, WASHBURN & MOEN MFG. CO.
WM. E. RICE, *President.*

124 EXHIBIT 17.

Sch. Benj. Hale & cargo.

Wason J. Morend, act'g ag't underwriters, in acc't with Nat'l Board Underwriters.

1893.		DR.	CR.
June 24.	To this am't rec'd from J. Raymond Smith & Co.....	$1,190.00	
" "	By paid bank commission....	.....	5.95
	" " United States admiralty court as per court record.....	.....	1,100.00
	By d'ft favor of J. Raymond Smith sec. nat'l board	.....	84.05
		$1,190.00	$1,190.00

E. & O. E.

WASON J. MOREND,
Act'g Ag't Underwriters.

Key West, Fla., 7, 5, '93.

What marine board paid on account of cargo to reimburse Capt. Hannah. Paid in addition to that, paid into court $10.00 per day from May 9th to June 3rd, 1893, inclusive. Living expenses $6 per day for some time. Travelling expenses $42.50 each way.

25 days at $16	$400
Travel	85
Total	$485

EXHIBIT 18.

Shipped by Capt. John Hall, master of Am. Schr. Benjamin Hale, on board the schooner called the Cactus, whereof L. S. Wiley is master, now lying in the port of Key West, and bound for Velasco, Tex. To say:

12,625 reels barbed wire.	478 bdls. hay bands.
1,146 bdls. plain "	15 bbls. wire.
249 kegs staples.	1 large reel wire rope.
5 reels wire rubber.	

Weights and contents unknown, not accountable for leakage, breakage and rust. It is understood this cargo is from the
125 wrecked Sch. Benj. Hale and is to be taken in the condition in which it is; said Sch. Cactus is not accountable for any damage the wire may have sustained, same being greater portion of original cargo of wrecked Sch. Benj. Hale, being marked and numbered as in the margin, and are to be delivered in like condition, at the aforesaid port of Velasco, Texas, (the dangers of the seas only excepted) unto Washburn & Moen Mftg. — or to their assigns, he or they paying freight for the said cargo and all other conditions as per charter-party. Dated at Boston 14 June, 1893, without primage and average accustomed.

In witness whereof, the master or purser hath affirmed to 4 bills of lading, all of this tenor and date; one of which being accomplished the others to stand void. Dated at Key West, the 28 day of June, 1893.

L. S. WILEY,
Master Schr. Cactus.

Vessel reported ready Friday, June 16th, at noon, and loaded June 28 at night, $175 is due Schr. Cactus for demurrage at this port as per charter-party.

CAPT. JOHN HALL,
C. o. W. J. TAYLOR,
Att'y in-fact.

Captain to telegraph to Washburn & Moen Mfg. Co., Houston Texas, immediately upon arrival of vessel at Velasco.

EXHIBIT 19.

June 13, '95.

Circuit Court of the United States for the District of Massachusetts.

WASHBURN & MOEN MANUFACTURING CO.
v.
THE RELIANCE MARINE INSURANCE CO.

JUNE, 1895.

Stipulation.

It is hereby agreed that I, L. S. Wiley, formerly master of the American schooner Cactus, if called, would testify as follows:
126 On the 28th of June, 1893, I sailed on board the Cactus from Key West, Florida, for Velasco, Texas, with a cargo of six hundred and sixty-six tons of barbed and smooth wire and staples, more or less, which was loaded at Key West, and was formerly on board the schooner Benjamin Hale; that I duly arrived at the port of Velasco on the 14th day of July, 1893, but that the Washburn and Moen Manufacturing Company refused to receive the same; that upon the 1st day of August I commenced to discharge said cargo at Velasco, completing the discharge on the 5th of August; that from said 5th of August, until the cargo was sold on the 20th day of September, under orders of the United States court, while a part of the cargo consisting of smooth wire and staples were placed in a warehouse, the balance lay upon the ground at said Velasco, at a place not upon the wharf, but upon skids on the ground some three hundred feet from the ship across the railroad track, subject to the action of the weather and such damage as might be caused by exposure, the said Washburn and Moen Manufacturing Company refusing to receive said cargo, and the agent of the Reliance Marine Insurance Company telling me that the "consignees are in error, look to them and the cargo." Velasco, Texas, was at that time a new port, and there were no warehouses there except the one belonging to the Brazos River Dock Company, and said cargo was stored on private property near the river bank, under a grove of trees.

CARVER & BLODGETT,
Att'ys for Plaintiff.
LOWELL, STIMSON & LOWELL.

EXHIBIT 20.

To the Hon. David E. Bryant, judge of the district court of the United States for the eastern district of Texas:

In the matter of the libel of L. S. Wiley *et al.* against 666 tons of barbed and smooth wire and staples numbered 654 A. D. upon the docket of said court, the said wire and staples being the cargo of the schooner Cactus, libelled for freight, demurrage and expenses,

the libellant respectfully represents to the honorable court
127 that the said 666 tons of wire and staples has been seized by the United States marshal for said district in pursuance of writ issued from said court, and *is* now in his possession at Velasco, Texas.

That monition has been published according to law citing all parties interested in said cargo of wire and staples to appear before said court in Galveston, Texas, on the 28th day of August, 1893, and answer libellant's bill, but there being no answer filed, libellant respectfully represents that the greater portion of said 666 tons of barbed and smooth wire and staples is exposed to the weather, there being no warehouse at Velasco in which to store the same. That it is damaging from said exposure, and deteriorating in value from rust, and that the cost of keeper and dock expenses is accumulating against said cargo.

Wherefore libellant prays that an order of sale issue, and after giving ten days' notice of same by publication, the marshal sell said 666 tons of barbed wire and staples according to law at Velasco, Texas, and that the proceeds of said sale be brought into court to await adjudication.

J. B. SHEA,
Proctor for Libellant.

Subscribed and sworn to before me, the undersigned authority, this 5th day of September, A. D. 1893.

JNO. A. WILKINS,
Notary Public, Brazoria Co., Texas.

EXHIBIT 21.

JULY 19TH, 1893.

George A. Cragin, Esq., agent Washburn Moen Mfg. Co., Houston, Texas.

DEAR SIR: Confirming telephonic conversation of this morning in which you informed me your company declares that it wishes to abandon the cargo of wire, etc, originally shipped on the schooner Benjamin Hale but now on board Sch. Cactus at Velasco, I would state that under the terms of the policy of insurance covering the said cargo, the underwriters are liable only for the value of such part of the cargo as has actually been lost from the vessel, and then only provided such portion amounts to 5 % of the entire
128 shipment hence inasmuch as the identical cargo of the Sch. Benjamin Hale is now at Velasco and has been tendered to you by the carrier, I would ask upon what grounds your company wishes to abandon the cargo. Please observe that the Reliance Marine Insurance Company, Ltd., are prepared to receive your claim for such portion of the cargo as has been actually lost on the voyage (provided of course that such portion amounts to five or more per cent. of the whole) and are willing to attend any survey you may call upon the cargo, but that under the terms of the policy, you are not justified in expecting the company to take over the cargo and pay you for it, and that the company declines to do this.

Also please note that all expenses, demurrage and other charges curred by your refusing to receive the cargo when tendered will for your account and risk and that the Reliance Marine Insur-ce Company, Ltd., will not hold itself responsible for any such sts.

Yours very faithfully, JAS. MOLLER, *Agent.*

This being all of the material evidence in the case, at the close the evidence in the case the plaintiff made the following with her requests for rulings, which are herewith given in the original mbers.

3. That it is a question of fact for the jury as to whether there ere such acts or instructions given by the defendant, its servants agents, as amounted to an acceptance of the abandonment.

4. An abandonment, even though at first refused, may be ac-pted by reason of delay in the forwarding of the cargo, or by ex-cising any acts of ownership or direction in relation to the same, by reason of failure to discharge a burden or lien which has risen by reason of perils insured against or by the acts or direction the defendant.

5. That the sale of the cargo at Velasco, Texas, under judicial rocess deprived the plaintiff of the property and made the loss a tal one, provided the suit which was brought, under which the rgo was attached, was larger in amount than the original freight by the schooner Benjamin Hale.

29 6. "An offered abandonment may be accepted even when the assured has no right to abandon, and, if accepted, it must e with its consequences; and an acceptance need not be expressly ade. It may even be refused, and yet the insurers by their con-uct may make themselves liable for a total loss."

Which the court ruled did not apply to the case at bar.

9. That if the cargo insured upon its arrival at the port of Velasco, exas, was of no commercial value for the purpose intended, then e plaintiff is entitled to recover for a total loss under the policy.

10. That the sale of the cargo at Velasco, Texas, under judicial rocess deprived the plaintiff of the property and made the loss a tal one.

11. That if, by reason of perils insured against, there was damage f loss to the property insured in excess of fifty per cent. of its value s given in the policy, and an abandonment was duly made before e property was in a place of safety, then the plaintiff can recover total loss.

12. That if, by reason of the perils insured against, the property sured is injured, and the cost of saving the same, together with e costs incident to the saving and the costs of forwarding the same the port of destination, amount to more than the value of the roperty insured at its arrival at the port of destination, then the laintiff can recover a total loss provided there is a seasonable bandonment.

14. That on all the evidence in the case, the court should order

a verdict for the plaintiff for the amount sued for, with interest from May 29, 1893.

15. That the jury shall find that the value of the goods shipped on board the schooner Benjamin Hale was forty-eight thousand eight hundred dollars ($48,800) for all the purposes of this case.

The court declined to give any of the above requests for rulings made by the plaintiff, and ruled that there was no evidence in the case that would warrant a jury in finding either an actual total loss or a constructive total loss, except an actual total loss of a minor part of the cargo referred to elsewhere, and that there was no evi-
dence that would warrant a jury in finding that there had
130 been an acceptance of the abandonment made by the plain-
tiff company. The court therefore duly made a charge to the jury giving his reasons therefor, which charge and reasons are made a part of this record, the court ruling that there could be a recovery only for a total loss of a part.

The plaintiff noted exceptions to the following portions of the charge and instructions at the time the same was made:

To the part of the charge and rulings which states that this court is not bound by the construction of this contract of marine insurance as given by the supreme court of the State of Massachusetts, although the contract was made in Massachusetts, and the suit was originally brought in the State court for said State; the plaintiff contending that the construction of the contract as given by the highest court in the State should govern in the case at bar and that this court is bound by such decisions.

To the part of the charge and rulings of the court which states that the articles insured under this policy were what is known as memorandum articles.

To the part of the charge and rulings of the court which holds in the case at bar that there is no evidence which warrants the jury in finding that there was in this case an actual total loss.

To the part of the charge and rulings that the defendant under this policy was not liable for a constructive total loss of the property insured.

To that part of the charge and rulings which states that there was no evidence that would warrant the jury in finding that there was an acceptance of the abandonment.

To that part of the charge and rulings which states that the transshipment of the cargo at Key West by the underwriters did not warrant the jury in finding that there was an acceptance of the abandonment.

To the part of the charge and rulings of the court which states that there was no evidence of delay at Key West that would warrant the jury in finding an acceptance of the abandonment.

To the part of the charge and rulings of the court which states that the difference in extra charges between the charter of the
schooner Cactus and the schooner Benjamin Hale had no
131 effect as to any abandonment and could not be considered by the jury in this case.

To the general charge and ruling of the court that the plaintiff

under this policy was not entitled to recover for a total loss; and to the refusal of the court to submit that question to the jury on which to found a general verdict.

The court ruled that there could be a recovery only for a total loss of a part, which question was submitted to the jury, and found a verdict thereupon by agreement in the sum of twenty-five hundred dollars ($2,500).

The court further ruled that there was a sufficient abandonment and sufficient evidence to warrant the jury in finding that there was a constructive total loss of the said cargo, but for the clause in the policy "free of particular average" and the memorandum clause; and the jury found as a special finding that there was a constructive total loss of the cargo. To the said charge and instructions of the court to the jury the plaintiff, at the time of the said charge made the following exceptions and rulings:

To all of the said requests for ruling and exceptions, the plaintiff having duly excepted to the general ruling that the plaintiff could not recover for a total loss, the said exceptions were duly allowed by the court.

The plaintiff, being aggrieved by said orders, instructions and rulings of the court, excepts thereto and prays that its exceptions may be allowed, as of the time of the trial of the cause.

By EUGENE P. CARVER,
EDWARD E. BLODGETT,
Its Attorneys.

October 2, 1895.

We have seen the foregoing bill of exceptions and have no suggestions to make.

LOWELL, STIMSON & LOWELL,
Attorneys for Defendant.

Said exceptions being proved to be true are allowed as of the day of the trial and before the verdict of the jury was rendered.

In witness whereof, I have hereunto set my hand this second day of October, A. D. 1895.

W. L. PUTNAM,
Circuit Judge.

132 *Defendant's Exceptions.*

(Filed and allowed Oct. 2, 1895.)

For the facts, proceedings and evidence in the above case, reference may be made to the plaintiff's bill of exceptions on file therein.

Concerning the special finding of the jury, to wit, that if the defendant was liable under the terms of the policy for a constructive total loss, then the evidence in the case showed that such a constructive total loss had been suffered, the defendant, after the taking of testimony had been concluded and before the judge's charge, duly presented to the court the following requests for rulings:

First. That the abandonment made by the plaintiff to the defend-

ant was insufficient, and that the jury should, therefore, find for the defendant.

Second. That if the plaintiff be entitled to recover for a constructive total loss, in estimating the same he is not to be allowed to deduct from the gross value of the damaged cargo any charges for salvage expenses paid by the defendant.

Third. That if the plaintiff be entitled to recover for a constructive total loss, in estimating the same he should not be allowed to deduct from the gross value of the cargo any general average charges.

The judge refused to give the rulings asked for, but instructed the jury as appears in the charge set forth in the bill of exceptions. He also instructed the jury that in computing a constructive total loss the jury should charge against the gross value of the cargo damaged all salvage expenses and general average charges paid by the defendant. Under these instructions the jury found specially that there was a constructive total loss.

To the said charges, instructions and rulings of the court the defendant duly noted the following exceptions:

First. To the direction of the judge to the jury as to the sufficiency of the notice of abandonment of the goods insured.

Second. To the direction of the judge to the jury that in computing a constructive total loss they should charge against the gross value of the cargo as damaged any salvage expenses paid by the defendant.

133 *Third.* To the direction of the judge to the jury that in computing a constructive total loss they should charge against the gross value of the cargo as damaged any general average charges paid by the defendant.

The defendant, being aggrieved by the said orders, instructions and rulings, excepts thereto, and prays that its exceptions may be allowed.

RELIANCE MARINE INSURANCE COMPANY,
By LOWELL, STIMSON & LOWELL,
Its Attorneys.

October 2, 1895.—Allowed.
W. L. PUTNAM,
Circuit Judge.

It is thereupon, to wit, Oct. 2, 1895, considered by the court, the Honorable William L. Putnam, circuit judge, sitting, that The Washburn and Moen Manufacturing Company, plaintiff, recover of the said The Reliance Marine Insurance Company, defendant, the sum of two thousand five hundred forty-five dollars damages, and its costs of suit taxed at —.

A true record.
Attest: ALEX. H. TROWBRIDGE, *Clerk.*

Plaintiff's Assignment of Errors and Prayer for Reversal.

(Filed Oct. 18, 1895.)

And now comes the plaintiff in the above-entitled action and says that in the judgment, decree and findings therein there is manifest error, to wit:

First. In not allowing the case to go to the jury on the question as to whether or not there was a constructive total loss.

Second. In not allowing the case to go to the jury on the question as to whether or not there was an absolute total loss.

Third. That the court erred in not ruling that it was a question of fact for the jury as to whether there were such acts done and instructions given by the defendant, its servants and agents, as amounted to an acceptance of the abandonment.

Fourth. That the court should have ordered on the whole
134 evidence in the case a verdict for the plaintiff for the amount sued for.

Fifth. That the court should have ruled that the sale of the cargo at Velasco, Texas, under judicial process, deprived the plaintiff of the property and made a total loss of the cargo under the policy.

Sixth. That the court should have ruled that if by reason of the perils insured against there was damage or loss to the property insured in excess of fifty per cent. of its value as given in the policy, and that an abandonment was duly made before the property was in a place of safety, the plaintiff could recover a total loss.

Seventh. That the court erred in not allowing the said case to go to the jury on the question as to whether or not there was a total loss either absolute or constructive.

Eighth. That the court erred in not allowing the case to go to the jury on the question as to whether or not the defendant had accepted the abandonment of the cargo made by the plaintiff.

And the plaintiff prays that the said judgment, decree and verdict may be annulled, reversed and held for naught, and that it may be restored to all things which it has lost by reason of said judgment and decree, and that it may be entitled to a new trial in the aforesaid cause, and that the aforesaid judgment and verdict may be reversed.

THE WASHBURN AND MOEN MANUFACTURING CO.,
By EUGENE P. CARVER, *Its Attorney.*

Defendant's Assignment of Errors and Prayer for Reversal.

(Filed Oct. 24, 1895.)

And now comes the defendant in the above-entitled action, and says that in the judgment, decree and findings concerning the special finding of the jury therein, there is manifest error, to wit:

First. That the court erred in holding that there was a sufficient abandonment by the plaintiff to the defendant.

Second. That the court erred in directing the jury that in com
puting a constructive total loss they should charge against th
135 gross value of the cargo as damaged any salvage expens
paid by the defendant.

Third. That the court erred in directing the jury that in compu
ing a constructive total loss, they should charge against the gro
value of the cargo as damaged any general average charges paid b
the defendant.

And the defendant prays that the said special finding and verdi
may be annulled, revoked and held for naught.

LOWELL, STIMSON & LOWELL,
Attorneys for Defendant.

(MEMORANDUM.—On the eighteenth day of November, A. I
1895, the defendant filed a waiver of all bonds and stipulations o
writ of error. On the twenty-fourth day of November, A. D. 189
the plaintiff filed a waiver of all bonds and stipulations on writ
error. Alex. H. Trowbridge, clerk.)

Citation on Writ of Error in No. 156.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Reliance Marine Insu
ance Company, Greeting:

You are hereby cited and admonished to be and appear in th
United States circuit court of appeals for the first circuit, in th
city of Boston, Mass., on the twenty-fifth day of November, curren
pursuant to a writ of error filed in the clerk's office of the circu
— of the United States, for the district of Massachusetts, wherein Th
Washburn and Moen Manufacturing Company, plaintiff, is plainti
in error, and you are defendant in error to show cause, if any the
be, why the judgment rendered against the said plaintiff in erro
as in the said writ of error mentioned, should not be corrected an
why speedy justice should not be done to the parties in that behal

Witness, the Honorable William L. Putnam, judge of the circu
court of the United States for the district of Massachusetts, thi
eighteenth day of November, in the year of our Lord one thousan
eight hundred and ninety-five.

WILLIAM L. PUTNAM,
United States Circuit Judge.

BOSTON, *Nov.* 19, 1895.

Service of the within citation is acknowledged.

LOWELL, STIMSON & LOWELL,
Attorneys for Defendant.

136 *Citation on Writ of Error in No.* 157.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Washburn and Moen Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the first circuit, in the city of Boston, Mass., on the twenty-fifth day of November, current, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Massachusetts, wherein The Reliance Marine Insurance Company, defendant, is plaintiff in error, and you are defendant in error, to show cause, if any there be why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William L. Putnam, judge of the circuit court of the United States, for the district of Massachusetts, this eighteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five.

WILLIAM L. PUTNAM,
United States Circuit Judge.

BOSTON, *Nov.* 19, 1895.

Service of the within citation is acknowledged.

CARVER & BLODGETT,
Attorneys for Washburn & Moen Mfg. Co.

Clerk's Certificate.

UNITED STATES OF AMERICA, *District of Massachusetts,* } *ss:*

I, Alexander H. Trowbridge, clerk of the circuit court of the United States for the district of Massachusetts, within the first circuit, certify that the foregoing is a true copy of the record in the cause entitled,

WASHBURN AND MOEN MANUFACTURING Company, Plaintiff, v. THE RELIANCE MARINE INSURANCE COMPANY, Defendant.	No. 356, Law Docket.

in said circuit court determined, the assignments of errors and prayers for reversal, and also the original citations upon the
137 writs of error issued in said cause, with acknowledgments of service thereon.

In testimony whereof, I hereto set my hand and affix the seal of said circuit court, at Boston, in said district, this twenty-third day of November, A. D. 1895.

[SEAL.] ALEX. H. TROWBRIDGE, *Clerk.*

Agreement.

(Filed in circuit court of appeals Dec. 16, 1895.)

It is hereby agreed that annexed hereto is a true copy of the charge to the jury and the reasons therefor, which are made a part of the bill of exceptions. (See lines 2 and 3 of page 130 of the printed record herein.)

The said copy annexed may be used in this court of appeals as if the same were annexed to the plaintiff's bill of exceptions and made a part thereof.

CARVER & BLODGETT,
Attorneys for Washburn & Moen Mfg. Co.
LOWELL, STIMSON & LOWELL,
Attorneys for Reliance Marine Ins. Co.

Charge to Jury, June 14, 1895.

PUTNAM, *J.*:

I will give counsel my views about this case. I desire to simplify, as much as possible, the questions that go to the jury. This was undoubtedly, a Massachusetts contract. It was delivered in this State by the agent of the defendant company, and, clearly, it is within *Equitable Life Assurance Society v. Clements*, 140 U. S., 226.

So far, therefore, as any local usages which have become a part of the subject-matter of underwriting marine risks in Massachusetts are concerned, this court would be bound to adopt the law as established by the decisions of the State court; yet, so far as a question comes up which is not one of mere local usage, but of general law, or a question of the interpretation of a commercial instrument, like a policy of insurance, although what we are seeking to
138 discover is, of course, the law in Massachusetts, yet, nevertheless, we are not governed by the decisions of the courts of Massachusetts, but by those of the Supreme Court of the United States, so far as we can find decisions bearing on the questions involved, and, so far as we do not find them, then by the general trend of authority.

I do not understand that under the Constitution and laws of the United States we are entitled to reject the law of Massachusetts with reference to this policy, but we are not in this case bound to follow the decisions of the courts of Massachusetts in ascertaining what the law of Massachusetts is. Therefore, in passing upon the principal question in this case, that is, whether this phrase, "free of particular average," covers a constructive total loss, I am bound to follow the decisions of the Supreme Court of the United States; and if I do not find such decisions, then I am bound to follow the general trend of authority.

There have been cited to me two cases,—*Marcadier v. Chesapeake Insurance Company*, 8 Cranch, 39, and *Morean v. United States Insurance Company*, 1 Wheaton, 219,—where it was held, directly and positively, that the underwriters are not liable for a constructive

total loss on articles contained in the usual memorandum clause. So far as counsel have been able to inform me, and so far as I have been able to find, the Supreme Court has never modified the position which it took in those two cases. It apparently approved it in *Hugg v. Insurance Co.*, 7 Howard, 605. The rule is an exceptional one, and against the general principles of underwriting. Nevertheless, there are these decisions of the Supreme Court, which never have been modified by that court, as far as I can find.

I thought it possible that these cases might have been decided before the doctrine of constructive total loss, as applied to cargoes, had been fully developed in this country. But I find it is not so, because in those cases that doctrine was fully elaborated, and the origin of it in the ancient maritime law recognized; so there is no change in the general law of marine insurance, so far as I can discover, which renders those decisions inapplicable at the present time.

Not only have those decisions been the law as established by the Supreme Court, but they have been recognized as such by all
139 text-book writers in the United States, so far as I can discover. Phillips on Insurance, which I regard as the most useful and reliable work on insurance which comes to hand in this country, sections 1615 and 1767, edition of 1867, lays down the rule positively, as given by the Supreme Court of the United States. Strange to say, in this last edition, the author takes no notice whatever of the Massachusetts cases, so far as I can find.

The rule was so recognized in Maine by Chief Justice Shepley, who, as judge and as lawyer, to my personal knowledge, had a large practical knowledge of marine insurance. This was in 1850, in *Williams v. Kennebec Insurance Company*, 31 Maine, 455. It is there accepted as the undoubted rule.

The plaintiff relies on *Kettell v. Alliance Insurance Company*, 10 Gray, 144, and *Mayo v. India Mutual Insurance Company*, 152 Mass., 172. The line of reasoning in these cases is entirely unsatisfactory. Perhaps it seems absurd for this court to question Chief Justice Shaw's line of reasoning, but even Homer sometimes nodded. If he had followed out the line of reasoning which he evidently started upon, that is, had attacked the entire doctrine found in the decisions of the Supreme Court of the United States, as contrary to the underlying rules with regard to the construction of marine policies, and had repudiated those cases entirely, there would be some very strong reasons in that behalf. But instead of doing this he undertook to make a distinction between the articles found in the memorandum clause proper, and articles found in a rider. So far as I can see, there is no reason in it. But, however that may be, I am bound by the broad rule laid down by the Supreme Court of the United States. Moreover, the policy in issue in this case meets the supreme court of Massachusetts fully, so far as that court has actually decided the question. That court undertook to make a distinction between the articles found in a memorandum clause proper and articles in a rider, but the policy at bar shows the subject-matter of this suit to be covered into the memorandum clause itself.

It is true that it is not clear that every article of the invoice in suit was covered by the memorandum clause. It enumerates only wire and steel; but any doubt is met by the rider, which obviates any question of that sort. For this case the rider is evi-
140 dently *in pari materia* with the memorandum clause, and must bear the same construction.

Therefore I shall instruct the jury that there can be no recovery in this case except for actual total loss.

Now, then, comes the question of the transshipment by the underwriters of this cargo from Key West to Velasco. The cargo was in entire safety at Key West; it was at a place where it could have been sold; it was within the reach of the owners, by telegraph and otherwise; and the question arises whether the underwriters, by meddling with the cargo at Key West, and transshipping it to Velasco, made themselves liable either by what may be regarded as an acceptance of an abandonment, or by a conversion of the property, in such a way as to make themselves liable therefor as underwriters.

I apply to this case, in its fullest length and breadth, what was said by this court in the case of *Monroe v. Insurance Company*, 52 Fed. Rep., 777, as follows:

"Undoubtedly the underwriters may so deal with property in peril as to convert what otherwise would be a partial loss into an absolute total one, or so as to bar themselves from denying that such a loss has accrued. But when the assured has obtained the benefit of a low premium by covering absolute total loss only, then in view thereof, and also in view of the fact that public policy requires that all interests should be encouraged to use the sue and labor or rescue clauses to the fullest extent, whatever may be done in that direction by the underwriters, as well as by the owners, in unintentional excess of power, should not be made a trap."

I have already remarked that in my view the sue and labor clause today, except so far as it enables the assured to charge the underwriters for the expenses incurred under it, amounts only to what the courts would now declare as a principle of the common law.

In determining whether or not the underwriters have made themselves liable for a total loss, when not so by the terms of the policy, by reason of their conduct with reference to the property insured, we must look at the circumstances and judge of them according to the fundamental rules of law. In cases where the underwriters may be holden for a constructive total loss, and the question is simply one of computation, or one of circumstances about which there could be a great variety of opinions or great doubts, very
141 slight circumstances may be sufficient to authorize a jury or a court to say that the underwriters have accepted an abandonment.

Many cases occur where the underwriters would not be strictly liable on a final adjustment, but for the interests of themselves, or in order to avoid doubtful litigation, they step in, and, by their own acts, or expressly, accept an abandonment, which, perhaps, they could not be compelled to accept. In a case of that sort, where the

underwriters may be holden for a constructive total loss, very slight circumstances may be taken as evidence that they have accepted an abandonment, because both parties are entitled to know what their respective positions and rights are, and know it early. Each party has a duty to perform, and so long as there is a question it ought to be determined, and therefore the courts of law scrutinize closely and critically, under those circumstances, the conduct of the underwriters, not only for the purpose of determining whether they have actually accepted the abandonment, but also whether they have so conducted themselves that the assured has a right to assume an acceptance.

But, in a case where there can be no liability for a constructive total loss, and no abandonment which will be of any value, the case is very different. Such a case requires a clear and strong presumption to induce the court to hold, or to allow a jury to hold, that the underwriters have voluntarily converted into a total loss a loss which they otherwise would not be liable for, especially when, as in this case, the underwriters have promptly and distinctly notified the assured that they do not accept the abandonment, so that the assured knows the position of the underwriters from the outset.

Therefore, as it appeared in this case that the defendants are liable for nothing except for absolute total loss, that they took that position from the outset, that they from the outset denied their liability for a total loss, I cannot allow the jury to pass on the question whether, on the facts proven, the underwriters, by transshipping this property to Velasco, made themselves liable for a total loss, when they otherwise would not have been; and I apply to the case, in the fullest breadth, the extract which I have already read from *Monroe v. Insurance Company*. I say this independently of the question whether or not the underwriters had a right,
142 under the circumstances, to make the transshipment, and because everything in the case shows that the transshipment, by whomsoever made,—and I think it was the underwriters who made it, the master had no right to transship,—by whomsoever made, it was done in good faith, and it did not prejudice its owner.

The testimony in behalf of the plaintiff shows that there was no market for this merchandise at Key West, but that there was at Velasco, and not only a market there, but Mr. Rice himself testified that Texas was the best market they had. Everything connected with this matter goes to show that the underwriters acted in good faith in making the transshipment, and, also, that there was nothing done by them to prejudice the interests of the owners of the cargo.

Therefore, if they exceeded their rights in the matter, I do not regard it as any evidence whatever of an intention on their part to accept the property, and certainly I cannot regard it as sufficient to enable me to say, as a matter of law, or to authorize the jury to say as a matter of fact, that the underwriters, by that transaction, against their declared and evident intention, did accept the property and make themselves liable for it as underwriters. Whether they made themselves liable for it as tort-feasors is another ques-

tion, which we have nothing to do with. But if those authorities are correct which hold that the question of a constructive total loss or an absolute total loss should be judged by the condition of things as it may actually exist at the original port of destination, then the underwriters had a clear right to transship this cargo to protect themselves against the rules which those authorities lay down.

However, without going into that, I am satisfied that the mere fact of transshipment, even if in making the transshipment the underwriters exceeded their power, does not, under the circumstances, cast upon them, as underwriters, a liability for a total loss.

It is said that there was some delay at Key West. I see no evidence here to go to the jury of any delay of a substantial or injurious character, which would justify me in changing the rule which I have stated with reference to the mere fact of transshipment. I doubt very much whether a jury would be justified in finding that there was any unreasonable delay whatever; but there was none of an injurious character, certainly, and none of which any
143 complaint was made, so far as this case goes, until it came to trial. This matter, with many other matters in the case, on both sides, as the Federal courts now apply the law of waiver, are in the same basket. If the parties are at issue upon a great leading fact, and conduct their matters with reference to that great issue, and make no objection at the time with reference to minor matters, they cannot set minor matters up for the first time in a court of law when the case comes to trial. The courts are holding more and more liberally to that rule, and it is a just rule, and in every sense a lawful one.

With reference to the five per cent. clause, I desire to know, Mr. Carver, whether you claim that there was an absolute total loss amounting to five per cent.?

Mr. CARVER: Yes, your honor.

The COURT: According to my figures it amounts to some $2,400.

Mr. CARVER: Yes, your honor; an excess of five per cent. There are two ways of figuring it.

The COURT: In what way?

Mr. CARVER: That is, there is an absolute total loss in regard to 426 reels of barbed wire, and in regard to 572 hay bands.

The COURT: What about the 426 reels of barbed wire?

Mr. CARVER: They were thrown overboard. Of course the difference between the goods that were lost and those that were shipped aboard the Cactus, or the difference between those that were landed at Key West and those that were shipped aboard the Benjamin Hale at Boston, amounts to forty-four tons.

The COURT: You mean that the amount of goods transshipped at Key West——

Mr. CARVER: Was forty-four tons less than were shipped in Boston.

The COURT: How do you value that forty-four tons?

Mr. CARVER: Well, of course your honor will note on the two bills of lading that they do not exactly correspond in every partic-

ular, but on the basis of forty-four tons the goods that were lost would amount to $2,900.

The COURT: I will allow you to go to the jury upon that issue.

Mr. CARVER: That is one point; and the other point can be figured in another way, which makes it amount to more.

The COURT: In what other way do you mean?

Mr. CARVER: The number of hay bands which were shipped, according to the Cactus bill of lading, were 572 less than were shipped according to the Benjamin Hale bill of lading.

The COURT: What you claim, then, is an actual shortage in the shipment from Key West?

144 Mr. CARVER: An actual shortage between the Cactus cargo and the other cargo.

The COURT: That I will allow you to go to the jury upon.

Mr. CARVER: And that is the only question that we can go to the jury upon?

The COURT: No; there is another question.

I have also considered what constitutes an absolute total loss. We all know the great difference among the authorities touching what constitutes such a loss. Some of them go to the extent of holding that if the property at the intermediate port would not be of sufficient value at the port of final destination to pay the additional charges, including the salvage charges and the additional cost of transshipment, this constitutes an absolute total loss.

For the purposes of this case I shall hold, according to my own judgment, what I believe to be the better principle, that inasmuch as a portion of this cargo—a considerable portion, including the staples, and a very large percentage of the fencing wire, was at Key West in a condition to be transshipped, and did in fact arrive at Velasco in specie, and suitable for the purposes for which it was originally intended, although not so suitable as it would have been if it had not been submerged in the sea—there is no absolute total loss, and I cannot therefore allow that question to go to the jury. *Hugg v. Insurance Co.*, 7 How., 595, 605. I so rule on the entire evidence in the case, so that there can be no question that the whole subject-matter will be reserved for the court of appeals, and the rights of the plaintiff will be entirely protected.

Now, then, there is the matter (which I did not speak of in its proper place) of the differences between the charter of the Cactus and that of the Benjamin Hale. Those differences come down to the following items: First, advance freight $700, which had been paid to the Benjamin Hale, and was not credited on the charter of the Cactus; second, the demurrage at Key West, $175; third, five continuous days for discharging at Velasco, instead of quick dispatch and discharge; fourth, expense of discharging at Velasco, $499.60; making a total of $1,354, besides whatever demurrage there was arising from the insertion of the five continuous days for discharging at Velasco instead of quick dispatch.

Now, so far as this is concerned, I will not submit any 145 question to the jury, because I regard all this as one of the minor matters which should have been raised at the time, if

it was to be insisted upon by the plaintiff. That goes with the other minor matters which I think cannot be taken advantage of here now, not having been insisted on at the time when they occurred. If they had then been insisted on they could have been easily adjusted by the underwriters, and the difficulties removed.

The parties have gone to much expense here to prove the facts touching a constructive total loss. I am aware that whatever ruling I make upon these topics will involve serious questions of law, and I am liable to err, and I deem it right and just to the parties that I should direct the jury to make a special finding of constructive total loss or no constructive total loss. So far as the case itself is concerned, I shall allow the plaintiff to go to the jury upon only the five per cent. clause, and the general verdict will be such as results from the five per cent. clause; but I think it proper and just, if the counsel on either side desire—and if the counsel on neither side desire it I will not bother the jury with it—if the counsel on either side desire it, I will let the jury find whether there was a constructive total loss or no constructive total loss.

Mr. CARVER: Your honor, I should like to have two things found, if agreeable to everybody—first, whether there was a constructive total loss under the fifty per cent. rule; and, second, as to whether or not the cost of saving the property, together with the expense of transshipment, amounts to more than the property was worth.

The COURT: I think that, so far as that last proposition is concerned, if the court of appeals shall hold that my rule is wrong you will have no difficulty. I do not want to send any more issues to the jury than are absolutely necessary. Insurance cases are complicated enough anyway. I desire to send to the jury only such issues as are absolutely necessary.

Mr. CARVER: Do I understand that your honor rules that if upon the point that I spoke of, as a matter of law, the evidence——

The COURT: I will deny all your requests on that point. I rule as a matter of law, that so long as part of the property was in condition to be used, there was no total loss. Now, touching the elements of constructive total loss, the elements which would go into it, so far as I can discover, are as follows: We begin with the valuation in the policy, and deduct from that about $1,200 for the cargo not shipped.

146 Mr. CARVER: $266 and some odd cents, your honor. We have agreed on the sum.

The COURT: The cargo not shipped?

Mr. CARVER: Yes, your honor. There is a mistake in that invoice.

The COURT: Very well.

I deduct the cargo jettisoned the first time the vessel touched and I estimate that these leave the policy valuation of the cargo aboard the Benjamin Hale at about $47,000. One-half of that would be $23,500. Now, the question is whether the cargo, the remnants of the cargo, were worth $23,500. I shall allow the jury to get at that by taking the market value at Velasco, deducting

from it all the special charges against the cargo at Key West, including salvage (*Aitchison v. Lohre*, 4 App. Cas., 755); also what was paid on account of the cargo at Key West for general average, if they can find it; and also the excess charges on the bill of lading of the Cactus, amounting to $3,148.54. The only doubt I had yesterday about the charges to be deducted was with reference to the matter of general average. I find that I was right about that, that under the clause in the policy the expenses at an intermediate port, before reaching the port of destination, are to be deducted in getting at the value of the cargo, although if the general average is not due until the arrival of the vessel at the port of destination, some authorities say that the deduction is not to be made.

Mr. LOWELL: Your honor, may I ask if the original freight should not be deducted in that case?

The COURT: No, sir. The law is thoroughly settled about that. The owners pay the freight, and if you take the value of the cargo at the port of destination, I find the rule laid down by Phillips on Insurance, squarely, and that is according to my memory of all the adjustments I have ever seen. It is more fully laid down in a work that was cited here yesterday, Parsons on Marine Insurance, in which it is stated, at page 106, vol. 2 of the edition of 1868: "The expenses may be separated into two classes: First, those incident to delay at the intermediate port, such as the unloading and the reloading of the goods, and all the expenses incurred to render them fit for reshipment; second, the increased freight, if any."

Mr. LOWELL: The increased freight?

The COURT: Yes.

Mr. LOWELL: Naturally, the increased freight.

The COURT: Yes; that is the rule.

Mr. LOWELL: I must have misunderstood your honor in what you said before, then. Of course that is so.

The COURT: Now I will let you go to the jury on the question of the five per cent. loss, and on the special finding touching
147 the question whether or not there was a constructive total loss, following the lines which I have indicated.

This has all been in the presence of the jury, and it will be regarded as a part of the charge, and any part of it may be excepted to.

Mr. CARVER: How does your honor rule with regard to the advanced freight that was paid? Is that included as a part of the loss under the five per cent.?

The COURT: No; you may proceed, gentlemen, to the jury.

Mr. STIMSON: May it please the court, I think that it is barely possible that we might be able to come to some agreement if we may be allowed five minutes.

The COURT: Very well; then the jury may take a recess of ten minutes.

After recess the court said to the jury:

You have heard, gentlemen, what I have said touching the rulings of law in this case, and in order to save repetition I will adopt what I have already said as part of my charge to you. It has all been

said in your presence, and unless I so adopt it, I must repeat it all, which would be a useless ceremony. Therefore it will go in the record as a part of my charge.

There are, in marine insurance, three kinds of losses,—one, an actual total loss, as, for example, where the cargo is sunk in the bottom of the sea, and is never recovered, or where, from the dangers of the sea, the essential nature of the cargo is changed, as, for instance, where hides become putrified, so that they no longer remain as hides,—where, indeed, the entire cargo disappears or where its substance is changed. Then there are cases of partial loss, which you all understand without any explanation. Then there are cases of what we call constructive total loss,—that is, where the cargo is not destroyed, or the substance changed, in the way that I have expressed it to you, but where, on account of certain marine injuries happening to the cargo, amounting to a certain percentage, the courts, under certain circumstances, allow the parties to regard the case as one of a constructive total loss. In such a case there is ordinarily an abandonment, such as you have heard read in this case; and the result is that where there is a constructive total loss, the plaintiff recovers the face of the policy, with certain deductions, which are not to be considered here.

Well, gentlemen, the rules which I have laid down in this
148 case, in your hearing, prevent you from allowing the plaintiff for any loss except an actual total loss, and that is because the parties have stipulated as follows, "free of particular average." That is a memorandum, or a rider, put upon the policy, and the construction I put on those words is such as would prevent the plaintiff from recovering either for a partial loss or for a constructive total loss, or for anything except an actual total loss.

So far as that is concerned, I take the responsibility of ruling the law as I deem right, and the same as to all other points in the case. You are to accept the law from me, and you will render such a verdict or verdicts as I direct you to render under the law as I give it to you. If an error is committed by me, you are not responsible for it, but it will be rectified by the court of appeals.

By accepting the rules of law which I give you, and acting on them, you will comply with your oaths as jurors, and the rights of all the parties will be reserved and finally settled by the court of appeals.

I say, gentlemen, that there can be no recovery except for an actual total loss, as I have described it to you; and I will say to you, that on the facts in this case there is no actual total loss, with the minor exception to which I will soon call your attention, inasmuch as a portion of the cargo came into the port of distress in its natural, normal condition, and in that condition was capable of being transported, and was, in fact, transported, to the port of final destination. Not only could there be no recovery for actual total loss for the cargo as a whole, but if the policy stopped there, there could be no recovery for actual total loss of any part of it, although a part was actually sunk in the bottom of the sea. To relieve the parties from that hardship, comes in the following: "but liable for

absolute total loss of a part if amounting to five per cent." That means, taking it all together, that while in this case there can be no recovery for an actual total loss of the whole cargo, there can be for the total loss of the part that was jettisoned at the time of the stranding, and perhaps some other parts, which I need not call your attention to especially,—there can be a recovery for those parts, if they amount to five per cent. of the entire valuation.

On my intimation to the counsel that I should rule the law
149 as has been stated to you, and in your presence, they have agreed that the amount of loss under the five per cent. clause was $2,500, to be without interest. Therefore, gentlemen, on the strength of that agreement, and on the rules of law as I have stated them in your presence, and to you, you will find a verdict for the plaintiff for $2,500, without interest, and no more; and the clerk will pass you the form of verdict for that purpose.

But, gentlemen, the parties have been to much expense and trouble in proving the facts in this case, contingent upon my ruling that they might recover for a constructive total loss. Of course the counsel could not see in advance how I might rule. For aught that they could know in advance, I might have ruled as I have ruled, or I might have ruled that the plaintiff could recover for a constructive total loss; and therefore, gentlemen, they have gone to the expense and trouble of putting in the proofs here bearing on the question of constructive total loss, and it is not right that they should be put to the expense of travelling over that ground again in the event the court of appeals should hold that I am wrong in my ruling. Therefore, I intimated to counsel that I would allow you to pass on the question whether or not there was a constructive total loss. That will not be a part of your verdict, but it will be a special finding. I need not go into any extended remarks, because I have explained to you, or in your hearing, the rule which will enable you to determine whether or not there was a constructive total loss. It is the usual fifty per cent. provision—that is to say, whether the cargo was damaged to the extent of fifty per cent., with certain limitations, certain deductions, which I have already explained. Moreover, on the rules of law which I have stated, which of course bind the counsel for this trial, and as to which they have a right to go before the court of appeals for that court to determine on this part of the case, whether I am right or wrong, the counsel have agreed that with the rules of law applied to them as I have stated them, and the instructions that I have said I should give you, the facts entitle the plaintiff to a finding that there was a constructive total loss. Therefore, gentlemen, I ask you to return a verdict for the plaintiff for $2,500; and also to return a special finding that there was a constructive total loss.

150 Mr. CARVER: I have made certain requests for rulings, all of which I understand are denied.

The COURT: No; I want to say that my rule is not to allow exceptions based on requests for rulings, unless the requests are brought to my attention in connection with noting the exceptions at the close of the trial.

After conferring with counsel, the court said further:

Mr. Foreman and gentlemen of the jury, there are one or two other points as to which the parties desire to except, and which, therefore, require me to make further statements to you. It will not change the verdict and special finding which you are to return under the direction of the court. The defendant desires to make an exception touching the abandonment which was read in the case. I will simply say that, under the circumstances of the case, the defendant cannot object to the abandonment for any reason; that no objection to its form was made at the time when the abandonment was received by the defendant; that subsequently in its letter the defendant put itself directly and squarely on the ground that it was liable only for an actual total loss, and could not be for constructive total loss. If this was correct, no abandonment was of importance in the case. Not having objected at that time to the form of the abandonment, even if it was not in all respects sufficient, they cannot object now. My judgment is that the abandonment was sufficient under the circumstances. At the present time, when underwriters receive information from all parts of the world, and sometimes know the facts of a wreck sooner and better than the owners of the vessel or cargo wrecked, abandonments are very apt to be brief and summary in their nature.

It is enough that they bring to the attention of the underwriters such facts as the underwriters need to know in connection with the other facts which they know, and that they express an intention to surrender the property. Under the circumstances of this case, with the knowledge which it is apparent the underwriters had at the time the abandonment was made, I regard the abandonment as sufficient; but even if it was not sufficient, the underwriters, by placing their defence upon the fundamental ground which I stated to you, waived objections to the form of the abandonment and cannot insist on them at the present time.

The plaintiff makes certain exceptions touching certain
151 & 152 requests as to the effect of the sale of the cargo at Velasco. There is no doubt that, under some circumstances, the mere sale of a cargo at a distant port by a process of a court constitutes an actual total loss; but that does not apply to this case, because in this case the fact shows, and it cannot be disputed and is not disputed, that the captain advised the defendant's agent at Houston of his arrival at Velasco on the day of his arrival there, so that the plaintiff had ample opportunity to pay the freight and stop proceedings in court, if it had desired so to do. This is another of these minor matters, which really does not touch the controversy between the parties, and which the parties did not insist on at the time, because their controversy went deeper than all such matters, and which, therefore, they cannot insist on at the present time.

In what I said this morning in your presence I laid down certain conclusions without distinguishing between them, whether they were conclusions of law or conclusions which result from the fact that there is not sufficient evidence in this case for you to find other than I have directed you to find. All the propositions which I have laid

down to you are not strictly propositions of law, but they are propositions flowing from the fact, in some cases, that they involve questions of law, and in the other cases, that there is not sufficient evidence to justify you in finding other than I have instructed you to find.

Is there anything further, gentlemen, anything further for me to say to the jury?

Mr. CARVER: No, your honor.

Mr. LOWELL: I understood, that what your honor previously said, covered the matter of salvage and general average.

The COURT: Undoubtedly that is all covered by what I said this morning. Mr. Stenographer, will you note that both parties noted exceptions after the charge and before the jury retired to consider their verdict, and their notes of exceptions I now pass to the clerk to be filed by him.

153 United States Circuit Court of Appeals for the First Circuit, October Term, 1896.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error,
v.
WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error. } No. 157.

Error to the circuit court for the district of Massachusetts.

Before Colt, Nelson, and Webb, JJ.

Opinion of the Court.

September 7, 1897.

WEBB, *J.*:

In the course of the disaster a part of the property insured, exceeding in amount five per cent. of the whole, was totally lost, and for this a verdict was taken for the plaintiff by consent. As to the rest of the property insured it is evident that the principal question in these cases is the ruling that the insurance company is not liable for a constructive total loss. The Massachusetts court has held that a policy like the one now before us, containing a warranty against partial loss, does cover a constructive total loss.

Kettell v. Alliance Insurance Co., 10 Gray, 144; *Heebner v. Eagle Insurance Co.*, 10 Gray, 131; *Greene v. Pacific Mutual Insur-*
154 *ance Co.*, 9 Allen, 217; *Mayo v. India Mutual Insurance Co.*, 152 Mass., 172.

These decisions of the State court, however, are not conclusive upon this court.

"The questions under our consideration, are questions of general commercial law, and depend upon the construction of a contract of insurance, which is by no means local in its character, or regulated by any local policy or customs. Whatever respect, therefore, the decisions of State tribunals may have on such a subject, and they are certainly entitled to great respect, they cannot conclude the judgment of this court. On the contrary, we are bound to interpret this instrument according to our opinion of its true intent and objects, aided by all the lights which can be obtained from all external sources whatsoever; and if the result to which we have arrived differs from that of these learned State courts, we may regret it, but it cannot be permitted to alter our judgment." *Carpenter v. Providence Washington Insurance Co.*, 16 Peters, 495, 511.

The supreme court, in the exercise of the duty so avowed, has examined this question and pronounced the judgment that, under such a policy as that in these cases, a constructive total loss is not covered. *Marcardier v. Chesapeake Insurance Co.*, 8 Cranch, 39; *Morean v. U. S. Insurance Co.*, 1 Wheaton, 219; *Hugg v. Augusta Insurance and Banking Co.*, 7 How., 595.

In *Insurance Co. v. Fogarty*, 19 Wallace, 640, that court reviewed these cases without in any way qualifying them. They are imperative authorities here, and, regarding them as controlling us, there will be no advantage in extending this opinion by citation and discussion of the numerous and conflicting decisions of State courts upon the same question.

It follows that the plaintiffs had not the right to abandon, and enquiry into the sufficiency of the assumed abandonment is of no use.

It has been urged upon us that insurers may make themselves liable by accepting an abandonment and their subsequent dealing with the property, even when there is no right to abandon. Allowing this to be so, we agree with the circuit judge that in this case the evidence was not sufficient to authorize the jury to find that the defendant ever accepted the abandonment, or did anything in respect to the property insured that was equivalent to an acceptance.

This court does not entertain the view of the circuit court that the underwriters chartered the Cactus and forwarded by her the cargo from Key West to Velasco. Considering the whole evidence upon that point, the sounder opinion is thought to be, that those things, if not done by the immediate action of the captain of the Benjamin Hale, they were at least done under his authority and with his approval. Before he left Key West, but after the Benjamin Hale and the cargo had arrived there, he authorized Taylor & Curry, the agents at that port of his vessel, to charter the Cactus if they could. When she was afterwards chartered, the charter-party purports to be made and concluded between the agents of the Cactus, of the first part, and John Hall, master of the Benjamin Hale, of the second part; and it is signed, "John Hall, master Sch. Benj. Hale." It is

true that the underwriters' agents advised that the cargo be forwarded. But leaving this question undetermined, the underwriters under the "sue and labor" clause of the policy, cannot be charged with the acceptance of an abandonment, especially as the insurers had no right to abandon, simply because they caused the property to be preserved and removed from a place where there was no agent of the assured, and where there was no market, and where there was no adequate means for its protection, to the place to which it was originally shipped, where were a good market and conveniences for its protection, and there offering it to the representatives of the insured to whom it had been in the first instance consigned. Such labor and care for the preservation of the property did not
156 make them liable for a total loss, if the property was forwarded by the first available conveyance and without unnecessary delay, as in this case.

The decision of this court in *Monroe v. British and Foreign Marine Insurance Co.*, 52 Fed. Rep., 777, disposes of the contention that the sale at Velasco entitles the plaintiff to recover for a total loss.

Finally, no error is found in the court below, and its judgment will be affirmed, but as both parties have sued out writs of error, and neither has sustained his exceptions, the costs of this court must be equally divided.

Judgment affirmed; costs of the circuit court of appeals to be divided equally.

157 & 158 United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error,
v.
WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error. } No. 157.

Error to the circuit court for the district of Massachusetts.

Judgment.

September 7, 1897.

These causes came on to be heard January 15 and 16, 1897, upon the transcript of the record of the circuit court of the United States for the district of Massachusetts, filed November 25, 1895, and were argued by counsel.

On consideration whereof, it is now, to wit, September 7, 1897,

ordered and adjudged as follows: Judgment affirmed; costs of the circuit court of appeals to be divided equally.

By the court:

JOHN G. STETSON, *Clerk.*

159 United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error. } No. 156.

Petition for Rehearing and Request that Certain Questions may be Certified to the Supreme Court of the United States.

(Filed October 14, 1897.)

And now, a decision having been rendered by this court overruling the exceptions of the plaintiff and affirming the judgment of the circuit court, the plaintiff in the circuit court, the plaintiff in error in this court, respectfully asks this honorable court to grant a rehearing of this cause and certify certain questions to the Supreme Court of the United States, for the following reasons:

1. Because the plaintiff could recover in the State court of Massachusetts where the suit was originally brought, and from which it was removed to this court by the defendant, a foreign corporation doing business in Massachusetts.

2. Because the contract of insurance to be here construed was made in Massachusetts.

3. Because the Supreme Court of the United States has never directly passed upon the question of a recovery of a constructive total loss of cargo under facts like those at bar, and that the dicta of that court, by which this court feels bound, is contained in decisions delivered by that court over seventy years ago.

160 4. Because in the case like the one at bar the plaintiff could recover, provided the suit had been brought in England, the home of the defendant corporation.

5. Because there is evidence that would warrant a jury in finding that the plaintiff accepted the abandonment.

6. Because there was evidence that would warrant the jury in finding that there was an absolute total loss under the policy.

The plaintiff in error respectfully requests that a rehearing be granted, and that under section 6 of chapter 517 of the acts of Congress of March 3, 1891, being the act creating circuit court of appeals, this honorable court certify to the Supreme Court of the United States the record in the aforesaid case, and ask of said court the following questions and propositions of law, viz:

First. As to whether or not there was error on the part of the circuit judge in not submitting to the jury the right of the plaintiff to recover for a total loss.

Second. As to whether or not there was sufficient evidence for the jury to find that there was an acceptance on the part of the defendant company of the abandonment offered by the plaintiff.

Third. As to whether or not the failure of the defendant corporation to discharge a lien created by it amounted to an acceptance of the abandonment.

Fourth. As to whether or not the cargo injured was of any commercial value for use for which it was made.

Fifth. As to whether or not the sale of the cargo at Velasco, Texas, under judicial process, deprived the plaintiff of the property, and made a total loss of the cargo under the policy.

Sixth. As to whether or not the plaintiff could recover for a constructive total loss under a policy like the one at bar, provided there was a seasonable abandonment, and provided the loss of the property injured was in excess of fifty per cent. of the value.

Seventh. As to whether or not the plaintiff could recover under this policy, by reason of the perils insured against, the injury to the property and cost of saving the same, together with the cost of transportation to the port of destination, amounting to more than the value of the property on its arrival at the port of destination.

Eighth. As to whether or not the court should have ordered
161 a verdict for the plaintiff for the amount sued for, with interest from May 29, 1893.

Ninth. As to whether or not the value of the goods shipped in this instance was $48,800 for all the purposes of this case.

Tenth. As to whether or not the policy of marine insurance, having been made in the State of Massachusetts, should have been construed according to the law of Massachusetts.

Eleventh. As to whether or not there could be a recovery for a constructive total loss of cargo under a policy of marine insurance when the words used were "free of particular average."

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Attorneys for Washburn & Moen Manufacturing Co.

Argument.

The questions decided in this case have never been decided by the Supreme Court of the United States, and the doctrine laid down in the decision of this honorable court is founded merely on a dicta of the Supreme Court of the United States, a case presenting the question never having been decided by that court.

If this action had been tried either in the State courts of Massachusetts, in the State courts of New York or in the courts of England, the plaintiff would have been entitled to recover upon the evidence which was before the jury. The plaintiff would have been entitled to recover in Massachusetts on the ground that this was a case of constructive total loss, notwithstanding the words "free of particular average" used in the policy of insurance. It would have been entitled to recover in England on the ground that the cost of saving the property and bringing it to the port of destination was more than

the property was worth upon its arrival at that port. It would also have been entitled to recover on the ground that the sale of the property at Velasco, Texas, was a sale by judicial process which made the property a total loss to the plaintiff. It would have been entitled to recover in the courts of New York on the ground that there was sufficient evidence to warrant the jury in finding that the defendant by its acts accepted the abandonment.

162 It is very desirable that on all matters of commercial law there should be a uniformity of decisions, and especially is this true with regard to matters of marine insurance where the property is constantly moving into different jurisdictions.

If the decision as laid down by this court is to prevail, then a different law would be presented in Massachusetts between citizens of that State and citizens of other States and foreign citizens. Again, if the amount in dispute was less than two thousand dollars ($2,000), a different rule would prevail, inasmuch as there could be no removal to the circuit court of the United States, even where the corporation is organized under the laws of some other State than of that in which the suit is brought. This surely is a condition of things which should not exist, and, inasmuch as the Supreme Court of the United States has not passed upon these questions, we submit that they should be submitted to that court for final adjudication, in the interest at least of uniformity in the law.

Certificate of Counsel.

We, Eugene P. Carver and Edward E. Blodgett, certify that we are attorneys for the plaintiff in error; that in our opinion the foregoing petition is well founded and is deserving of judicial consideration, and we hereby certify that the same is not intended for delay.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Counsel for the Washburn & Moen Mfg. Co.

163 United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error,
v.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error.
} No. 156.

Order of Court.

October 30, 1897.

Upon consideration of the petition for rehearing, and request that certain questions may be certified to the Supreme Court of the United States, filed October 14, 1897, no judge who concurred in

the judgment desiring that the petition should be granted, or permitted to be argued, the petition is denied.

By the court:

JOHN G. STETSON, *Clerk.*

164 *Clerk's Certificate.*

United States Circuit Court of Appeals for the First Circuit.

I, John G. Stetson, clerk of the United States circuit court of appeals for the first circuit, certify that printed pages numbered 1 to 151, inclusive, hereto prefixed, contain and are true copies of writs of error, returns thereon of the circuit court of the United States for the district of Massachusetts, and transcript of the record of said circuit court, annexed to and returned with said writs of error, the same being the entire record upon which the causes entitled—

WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Plaintiff in Error, *v.* RELIANCE MARINE INSURANCE COMPANY, Defendant, Defendant in Error;	No. 156.
RELIANCE MARINE INSURANCE COMPANY, Defendant, Plaintiff in Error, *v.* WASHBURN AND MOEN MANUFACTURING COMPANY, Plaintiff, Defendant in Error,	No. 157.

were lately heard and decided in said circuit court of appeals.

I further certify that printed pages numbered 153 to 157, inclusive, hereto prefixed, contain and are true copies of the opinion of said circuit court of appeals, announced September 7, 1897, and of the judgment of said court entered in accordance therewith.

I further certify that printed pages numbered 159 to 163, inclusive, hereto prefixed, contain and are true copies of a petition for rehearing, and request that certain questions may be certified to the Supreme Court of the United States, filed in the first of said
165 causes, No. 156, Washburn and Moen Manufacturing Company, plaintiff, plaintiff in error, *v.* Reliance Marine Insurance Company, defendant, defendant in error, and of the order of court denying the same.

I further certify that said writs of error, returns thereon, transcript of record, opinion and judgment of the circuit court of appeals, petition for rehearing and request for certification, and order of court denying the same, remain on file and of record in said causes in said United States circuit court of appeals, and that said pages above named, containing true copies thereof, contain and are a true copy of the record and all proceedings in said causes in said United States circuit court of appeals to and including November 10, 1897, and that the issuing of the mandate upon said final decree

of September 7, 1897, has been stayed until the further order of court.

In testimony whereof, I hereunto set my hand and affix the seal of said United States circuit court of appeals for the first circuit, at Boston, in said first circuit, this tenth day of November, 1897.

[Seal United States Circuit Court of Appeals, First Circuit.]

JOHN G. STETSON, *Clerk.*

166 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the first circuit, Greeting:

Being informed that there is now pending before you a suit in which The Washburn & Moen Manufacturing Company is plaintiff in error and The Reliance Marine Insurance Company is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Massachusetts, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United States,

167 do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Return of United States Circuit Court of Appeals for the First Circuit on Writ of Certiorari.

And now, here, the judges of the United States circuit court of appeals for the first circuit make return of this writ of certiorari by annexing hereto and sending herewith, under the seal of the said court, a true and attested copy of an agreement filed in the clerk's office of said circuit court of appeals to be used in place of a certified copy of the record of said cause in making this return.

In testimony whereof I, John G. Stetson, clerk of said United States circuit court of appeals for the first circuit, have hereto set my hand and the seal of said court, at Boston, in the first judicial circuit, this second day of February, A. D. 1898.

Seal United States Circuit Court of Appeals, First Circuit.

JOHN G. STETSON, *Clerk.*

United States Circuit Court of Appeals for the First Circuit, October Term, 1897.

WASHBURN & MOEN MANUFACTURING COMPANY, Plaintiff in Error, *v.* RELIANCE MARINE INSURANCE COMPANY, Defendant in Error.	No. 156.

(Filed in the clerk's office February 2, 1898.)

In the above-entitled case it is hereby agreed that the certified copy of the transcript of the record heretofore filed in the United States Supreme Court with a petition for a writ of certiorari in case numbered 525 of the October term, 1897, may be taken as a return to the writ of certiorari granted by the Supreme Court of the United States on said petition and filed in this court.

[Seal United States Circuit Court of Appeals, First Circuit.]

EUGENE P. CARVER,
EDWARD E. BLODGETT,
Attorneys for Plaintiff in Error.
FREDERIC J. STIMSON,
Attorney for Defendant in Error.

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

168 [Endorsed:] Supreme Court of the United States. No. 525, October term, 1897. The Washburn & Moen Manuf'g Co. *vs.* The Reliance Marine Insurance Co. Writ of certiorari and return thereon of the United States circuit court of appeals for the first circuit.

169 [Endorsed:] Case No. 16,738. Supreme Court U. S., October term, 1897. Term No., 525. The Washburn & Moen Man'f'g Co. *vs.* The Reliance Marine Insurance Co. Writ of certiorari and return. Office Supreme Court U. S. Filed Feb. 4, 1898. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,738. U. S. C. C. of appeals, first circuit. Term No., 203. The Washburn and Moen Manufacturing Company, petitioner, *vs.* The Reliance Marine Insurance Company (Limited). Filed December 4, 1897.

To the Supreme Court of the United States:

The WASHBURN & MOEN MANUFACTURING COMPANY, a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts, and having its usual place of business in Worcester in said Commonwealth, petitions for a writ of *certiorari* to be directed to the United States Circuit Court of Appeals for the First Circuit, to bring before this Honorable Court the case of the WASHBURN & MOEN MANUFACTURING COMPANY *v.* THE RELIANCE MARINE INSURANCE COMPANY (LIMITED), numbered 156 in said Court.

Your Petitioner respectfully alleges: —

First, That your Petitioner was and is a corporation duly organized and existing under the laws of the Commonwealth of Massachusetts.

Second, That The Reliance Marine Insurance Company (Limited) was and is a corporation duly organized and existing under the laws of the Kingdom of Great Britain and Ireland, and having a usual place of business in Boston in said Commonwealth of Massachusetts.

Third, That on September 27, 1893, the said Washburn & Moen Manufacturing Company brought a suit in the Superior Court for the County of Suffolk in said Commonwealth of Massachusetts against the said The Reliance Marine Insurance Company on a policy of marine insurance issued by it in the sum of forty-eight thousand, eight hundred dollars ($48,800), on a cargo of barbed wire laden on board the Schooner "Benjamin Hale"; said cargo being valued in said policy at forty-eight thousand, eight hundred dollars ($48,800); and said insurance being issued against perils of the sea and other perils therein mentioned.

Fourth, That said suit was returnable in the Superior Court for the County of Suffolk on the first Monday of November, A.D. 1893. That on November 24, 1893, upon petition of the said The Reliance Marine Insurance Company (Limited), the said cause was removed to the Circuit Court of the United States in and for the District of Massachusetts; and on the same day a bond was given by said Insurance Company. That thereupon said cause was entered in said Circuit Court on the May Term, A.D. 1894, being the next term of the said Circuit Court after said cause was removed thereto.

Fifth, That thereafter the said cause came on for trial in the United States Circuit Court for the District of Massachusetts, and was tried before the Honorable William L. Putnam, Circuit Judge, on June 14, 1895. That at the trial of said cause the plaintiff proved the following: —

That on March 15, 1893, the Washburn & Moen Manufacturing Company took out a policy of marine insurance in The Reliance Marine Insurance Company (Limited) of London, England, in the sum of forty-eight thousand, eight hundred dollars ($48,800), on a cargo of wire from Boston to Galveston and or Velasco, Texas, on the said Schooner "Benjamin Hale," the said wire being valued at the sum insured, the rate of premium being one and one-fourth (1¼) per cent, and amounting to the sum of six hundred ten dollars ($610), which premium was paid in cash by the plaintiff.

The policy contains the following clause stamped upon it in red ink, being what is known as a "rider," viz: —

"Free of particular average, but liable for absolute total loss of a part if amounting to five (5) per cent."

Copy of policy, Record, p. 107, Exhibit 1.

The said Schooner "Benjamin Hale," with the insured cargo on board, sailed from Boston in a good seaworthy condition, on March 31, 1893, bound to Velasco, Texas.

On April 15, 1893, the vessel ran ashore on Bahama Bank and threw overboard about two hundred reels of barbed wire, which resulted in the schooner floating and proceeding on her voyage On April 19, 1893, the schooner ran ashore on Bird Key, near Dry Tortugas, and at once filled with water and sank.

Record p. 20.

On April 22, 1893, the master went on a packet to Key West, where he arrived on Saturday, April 23 in the evening. On Monday, April 24, he sent a telegram to the Washburn & Moen Manufacturing Company. At the time that he sent the telegram he thought that the vessel and all the cargo on board was a total loss.

Record, p. 21.

This telegram is found on page 117, Exhibit 8, and is as follows: —

"April 24, 1893. Hale ashore, Tortugas. Full water. Badly broken up. Think total loss. John Hall."

On April 24 or the next day, Daniel N. Bates, representing the plaintiff, called at the office of Mr. Poole, the agent of the defendant company in Boston, told him what he knew in regard to the trouble and offered to abandon the cargo to the underwriters.

Record, p. 25.

That afterwards he consulted counsel in the case, and as a result of that interview a letter of abandonment was sent to the agent of the defendant company, in which was enclosed a bill of lading and a copy of the invoice, which had been received in the meanwhile.

This letter of abandonment was written because Mr. Bates was told by his counsel that in the ordinary Boston form of marine insurance policy there was a clause requiring an abandonment to be made in writing and he did

not have the policy with him at the time. The letter of abandonment was written on April 29.

See Record, p. 111, Exhibit 2.

The policy in the case at bar was not in the Boston form, so that an oral abandonment was sufficient.

After the abandonment to the defendant company the Washburn & Moen Manufacturing Company never exercised any control or management of the property whatsoever. The written offer of the Washburn & Moen Manufacturing Company to abandon was replied to by Mr. Poole, agent of the Insurance Company. The reply will be found in Record, p. 115, Exhibit 6.

On April 24 the master of the said Schooner "Benjamin Hale," in company with the underwriter's agent who represented the Insurance Company, proceeded to the vessel, which was floated by wreckers on May 2 and brought to Key West. She arrived at Key West, May 4, full of water, and was discharged on May 10, 1893.

Record, p. 21.

At Key West libels were filed in the United States District Court by a number of salvage claimants against both the vessel and cargo for saving the same, separate libels being filed by the different sets of salvors. Under these libels for salvage the vessel was sold and the cargo was bonded by persons acting under the direction and in behalf of the Reliance Marine Insurance Company (Limited), which company also employed counsel to defend the salvage suits. These salvage suits were heard together, and a decree was entered against both vessel and cargo, the decree against the cargo amounting to the sum of nine thousand, three hundred ninety-three and fifteen one-hundredths dollars ($9,393.15), which sum, together with the expense of defending the suit and the expense of taking care of the cargo at Key West, was paid by the Reliance Marine Insurance Company (Limited). The sum paid in the Registry of the Court was nine thousand, three hun-

dred ninety-three and fifteen one-hundredths dollars ($9,393.15), together with the sum of eleven hundred dollars ($1,100),

Record, pp. 53 and 57,

in all the sum of ten thousand, four hundred ninety-three and fifteen one-hundredths dollars ($10,493.15).

In addition to the above there was paid by the defendant Company four hundred eighty-five dollars ($485.) to the agent to look after and protect the cargo at Key West, making the total expense of saving the cargo and putting it in a place of safety at Key West, the sum of ten thousand, nine hundred seventy-eight and fifteen one-hundredths dollars ($10,978.15).

The Schooner "Benjamin Hale" was sold by the U. S. Marshal under an order issued in the salvage suits, and her voyage was abandoned on or about June 15, 1893.

None of the owners purchased the vessel at the sale.

Record, p. 59.

Captain Hall, her master, left the Schooner "Benjamin Hale" on June 10, 1893, and proceeded to Boston, having no intention of returning, and leaving no person in charge of her as master; the vessel at that time being in charge of the U. S. Marshal under an attachment and an order issued for her sale.

After the arrival of Captain Hall in Boston, at the request of the underwriters on the cargo, and at their solicitation, he signed a charter-party of the Schooner "Cactus" to carry the cargo from Key West to Velasco, and the cargo was loaded on board of the Schooner "Cactus" under the supervision of the general and special agent of the underwriters.

This charter-party was made after the sale of the "Benjamin Hale," and while the cargo was in a place of safety at Key West. The Schooner "Cactus" completed her loading on June 28, 1893, and proceeded to Velasco, Texas, where she arrived on July 14, 1893, and duly reported as

ready to discharge cargo to the agent of the Washburn & Moen Manufacturing Company at that port, which agent, under instructions from his principals, refused to accept the cargo, and thereupon the master of the "Cactus" libelled the cargo for both freight and demurrage and sold the same; the cargo being purchased at that sale by a third party for the sum of ten thousand dollars ($10,000).

Record, p. 69.

The charter-party of the Schooner "Cactus," which is found on page 120, Exhibit 10, of the Record, differs from the original charter-party of the "Benjamin Hale," Exhibit 7, page 116 of the Record, in the following particulars: —

The rate of freight is the same from Key West to Velasco as from Boston to Velasco. In the charter of the "Benjamin Hale" no time is fixed for the loading or discharging of the cargo, whereas it is specified in the charter of the "Cactus" that she shall load in seven running days and that she shall discharge at Velasco in five running days. The loading of the cargo was done under the supervision of the underwriters, Captain Hall having left the vessel and leaving no one in charge of her or the cargo except the agent of the underwriters. Before the charter of the Schooner "Cactus," which was made in Boston, the captain had abandoned the voyage.

Under the said charter-party of the "Cactus" the rate of demurrage was fifty dollars ($50) per day, and the "Cactus" was delayed in loading the cargo at Key West three and one-half (3½) days, causing a demurrage in the sum of one hundred seventy-five dollars ($175), all of which accrued prior to the schooner leaving Key West; and in Velasco the delay in discharging was fifteen and one-half (15½) days, making the amount of the charter, together with the demurrage, the sum of three thousand, one hundred forty-eight and fifty-four one-hundredths dollars ($3,148.54).

The Washburn & Moen Manufacturing Company were

not told of the charter of the Schooner "Cactus," nor were they in any way informed of the action that was being taken by the defendant company in forwarding the cargo to Velasco, Texas, although they were within easy communication of the defendant, and the property at Key West was in a place of safety.

When the Schooner "Cactus" left Key West, there was a charge for one hundred seventy-five dollars ($175) demurrage on the cargo, and seven hundred dollars ($700) more freight to be paid upon arrival at Velasco than if the cargo had been carried there by the Schooner "Benjamin Hale."

Upon the arrival of the Schooner "Cactus" at Velasco, the master of the "Cactus" libelled the cargo for freight and demurrage and sold the same, leaving a balance in the Registry of the Court, after paying his claim of costs and expenses, five thousand, three hundred sixty-nine and twenty-three one-hundredths dollars ($5,369.23).

This charter-party of the "Cactus" was entered into by the defendant Insurance Company without any request on the part of the Washburn & Moen Manufacturing Company, and without their knowledge.

The jury found in this case by a special finding that there was a constructive total loss of the cargo by perils insured against.

Evidence was introduced by the plaintiff that the cost of saving the property and landing it at Key West was more than the value of the property at Key West.

Evidence was introduced by the plaintiff that the cost of saving the property and forwarding it to the port of destination was more than the value of the property at the port of destination.

There was no question about the abandonment being seasonable, and no question but that the loss insured against exceeded fifty per cent of the value of the cargo.

The judge of the Circuit Court ruled that there was not sufficient evidence to warrant a jury in finding that there was a constructive total loss by reason of the clause in the policy "free of particular average."

The Court, although requested by the plaintiff, declined to allow the case to go to the jury on any ground, ruling, —

(1) That there was not sufficient evidence to warrant a jury in finding that there was an absolute total loss.

(2) That there was not sufficient evidence to warrant a jury in finding that there had been an acceptance of the abandonment.

(3) Ruling that the plaintiff could not go to the jury on a question as to whether or not there was a total loss, either absolute or constructive.

To each and all of which rulings and refusals to rule, the plaintiff duly excepted; the exceptions being found on pages 128 to 131 on the Record.

Sixth, Thereupon the plaintiff applied for a writ of error to the United States Circuit Court of Appeals for the First Circuit, which writ was granted and filed, and at the same time filed its Assignment of Errors, which is found on page 133, and incorporates in substance the instructions prayed for by the plaintiff, which were refused at the trial of the case.

These Assignments of Error were as follows: —

1. In not allowing the case to go to the jury on the question as to whether or not there was a constructive total loss.

2. In not allowing the case to go to the jury on the question as to whether or not there was an absolute total loss.

3. That the Court erred in not ruling that it was a question of fact for the jury as to whether there were such acts done and instructions given by the defendant, its servants and agents, as amounted to an acceptance of the abandonment.

4. That the Court should have ordered on the whole evidence in the case a verdict for the plaintiff for the amount sued for.

5. That the Court should have ruled that the sale of the cargo at Velasco, Texas, under judicial process, deprived the plaintiff of the property, and made a total loss of the cargo under the policy.

6. That the Court should have ruled that if by reason of the perils insured against there was damage or loss to the property insured in excess of fifty per cent of its value as given in the policy, and that an abandonment was duly made before the property was in a place of safety, the plaintiff could recover a total loss.

7. That the Court erred in not allowing the case to go to the jury on the question as to whether or not there was a total loss either absolute or constructive.

8. That the Court erred in not allowing the case to go to the jury on the question as to whether or not the defendant had accepted the abandonment of the cargo made by the plaintiff.

In the case at bar the Washburn & Moen Manufacturing Company was prevented from going to the jury on the question as to whether or not there was a total loss under the policy, and this was the error complained of. The other errors refer simply to different phases of the same question, which were duly presented to the Court at the trial of the case.

Seventh, It was the contention of the plaintiff in the Circuit Court and said Circuit Court of Appeals that there was sufficient evidence to warrant a jury in finding that the Insurance Company was indebted to them under the policy to the full amount of the same, and for the following reasons: —

I. That there was evidence sufficient to warrant a jury in finding that there was an absolute total loss of the property.

II. That there was sufficient evidence to warrant a jury in finding that there was an abandonment duly made, and

an acceptance of the abandonment on the part of the defendant company.

III. That the Circuit Court should have ruled that the plaintiff was entitled to recover for a constructive total loss under the policy.

IV. That there was a loss of property by judicial process for which the defendant company was liable.

Eighth, That said case came on to be heard, and was heard before the said United States Circuit Court of Appeals for the First Circuit on November 18, 1895, before the Hon. L. B. Colt, Circuit Judge, Thomas L. Nelson and Nathan Webb, United States District Judges, and on September 7, 1897, said Court filed an opinion, a copy of which is found in the Record, affirming the ruling of the Circuit Court.

Ninth, In said opinion the said Circuit Court of Appeals found that in the State Court of Massachusetts where this suit was originally brought, the plaintiff could recover for a constructive total loss under the facts here presented; but the Court further found that the Supreme Court of the United States had adopted a different rule, and that the said Circuit Court of Appeals felt bound by such opinion. That said Court did not attempt to pass on the question as to whether or not there was an absolute total loss under the terms of the policy, and no mention is made in the opinion on that point. The said Court also found that there was not sufficient evidence to warrant a jury in finding that the defendant by its acts accepted the abandonment.

Tenth, Thereupon the plaintiff filed in said Circuit Court of Appeals a petition for re-hearing, asking that certain questions of law be certified to this Honorable Court for its opinion, which petition, a copy of which is found in the Record, was denied by said Circuit Court of Appeals on November 1, 1897.

Eleventh, The plaintiff claims that the contention that the case at bar has been decided by the decisions of this Honorable Court is not warranted by the decisions. That under the decisions of the highest Court in England in a case like the one at bar, the plaintiff could recover for a total loss. That there was sufficient evidence to warrant a jury in finding that there was an absolute total loss.

Twelfth, That a writ of *certiorari* should issue in this case on the following grounds:—

1. That the finding of the Court is contrary to the rule of law existing in the Commonwealth of Massachusetts, and is so stated in the opinion.

2. That the decision of the Circuit Court of Appeals is different from the law as stated by the Supreme Court of the United States on the question of what amounts to an acceptance of abandonment.

3. That the decision of the Circuit Court of Appeals is contrary to the rule of law laid down in England on all questions presented before it.

4. That the Circuit Court of Appeals in its decision states a different rule of law than is stated by any other Court.

5. That the case presented is one of great importance to the commercial community.

6. That the construction of the policy of insurance herein stated should be uniform in the different circuits and districts of the United States.

7. That the decisions which the said Circuit Court of Appeals rely on do not sustain the position assumed by said Court in its opinion.

8. That the contract which is made in Massachusetts by a Company doing business therein, should be construed according to the law and usage of that State.

WHEREFORE, your Petitioner prays that a writ of *certiorari* may be granted by this Honorable Court in the above

entitled cause to the United States Circuit Court of Appeals for the First Circuit.

WASHBURN & MOEN MFG. CO.,
WM. E. RICE, *President.*

COMMONWEALTH OF MASSACHUSETTS.

WORCESTER, SS. WORCESTER, November 6, 1897.

I hereby certify that on the 6th day of November, A.D. 1897, before the subscribed, a Notary Public duly qualified, personally appeared WM. E. RICE, President of the WASHBURN & MOEN MANUFACTURING COMPANY, and made oath that the matters and facts contained in the foregoing petition are true as therein set forth, to the best of his knowledge, information and belief.

WITNESS my hand and Notarial Seal the day and year above written.

[SEAL] CHARLES RANLET,
Notary Public.

I, Eugene P. Carver, duly admitted to practice in the Supreme Court of the United States, hereby certify that I have examined the foregoing petition for a writ of *certiorari* and in my judgment from the matters stated therein the writ ought to issue.

EUGENE P. CARVER.

The Supreme Court of the United States.

WASHBURN & MOEN MANUFACTURING COMPANY

v.

THE RELIANCE MARINE INSURANCE CO.

In Petition for Writ of Certiorari.

BRIEF OF THE PLAINTIFF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

As the petition in this case states the facts quite fully and also the reasons why in the opinion of the petitioner a writ of *certiorari* should issue to the United States Circuit Court of Appeals for the First Circuit, this brief will merely discuss the questions of law and such questions of facts as may be interwoven therewith.

It seems only necessary to state in connection with the facts stated in the petition that there was evidence presented to the jury that the cargo of barbed wire insured aboard of the schooner "Benjamin Hale" was valued in the policy in the sum of $48,800. That the said schooner struck a rock off the Florida Keys, filled with water and sank, so that the wire became entirely submerged. That while the vessel and cargo were both submerged and apparently never could be saved, the insured made an abandonment in due form to the Insurance Company. That afterwards the property was saved, brought to Key West and put in a place of safety. That the cost of saving the property, together with the expenses incident to the same, amounted to more than the value of the wire after it was

saved. That the property was afterwards forwarded by the Insurance Company in another vessel to the port of destination, and that by reason of that action a lien was incurred which resulted in the sale of the property by judicial process and thereby its loss to the plaintiff. That there was evidence before the jury that the property after being wet in salt water was of no commercial value. That the loss occasioned by perils of the sea alone amounted to more than one-half the value of the property as fixed in the policy. That the plaintiff never exercised any acts of ownership over the property after the abandonment was made by it, and it is claimed that sufficient evidence was introduced to warrant the jury in finding that there was an acceptance of the abandonment by the Insurance Company.

That the Circuit Court ruled, and this ruling was affirmed by the Circuit Court of Appeals, that the question as to whether or not there was a total loss either absolute or constructive, or whether or not there was an acceptance of the abandonment, was something which the jury could not pass upon. The plaintiff contended that they were questions of fact to be submitted to the jury. In other words, the Courts both ruled that on all the evidence in the case there was not sufficient evidence to warrant the jury in finding that there was a total loss under the insurance policy or that the Insurance Company was in any way liable for the amount sued for.

ARGUMENT.

The question presented is: Was the plaintiff, on all of the evidence in the case, entitled to recover for a total loss of the cargo under the terms of the policy issued by the defendant company?

It is agreed by the defendant that it could recover but for certain clauses in the policy. The plaintiff contends that there was sufficient evidence to entitle it to recover on either of three grounds:—

1. That there was a constructive total loss of the cargo and a seasonable abandonment.

2. That on the evidence the jury would be entitled to find that there was an absolute total loss.

3. That on the evidence the jury would be entitled to find that there was an acceptance of the abandonment.

I.

That there was a constructive total loss.

This requires a consideration of what is a constructive total loss of cargo and when it is to be applied.

The Doctrine of Constructive Total Loss.

There are two rules as to what is a constructive total loss under a policy of marine insurance.

1. The English rule is that, in the case of a vessel, if the amount of repairs caused by perils insured against is more than her value, or in the case of cargo, if the cost of saving and forwarding the same amounts to more than the value of the same at the port of destination, then, if there is an abandonment seasonably made, there can be a recovery for a total loss.

2. The rule in the United States in the case of both vessel and cargo is that, if the damage by perils insured against is in excess of one-half of the value, and an abandonment is seasonably made, there is a constructive total loss.

This doctrine was first laid down in this form in Massachusetts in 1810 by C. J. Parsons in

Lincoln *v.* Kennebec Ins. Co., 6 Mass. 479.

This doctrine was first applied to the case of cargo by the Supreme Court of the United States at a later date.

If, therefore, in the case at bar there were no restrictive clauses, there could be a recovery for a constructive total loss, as the abandonment was seasonably made.

The only clauses which could govern are either the clause in the body of the policy, where all kinds of wire, etc., are "*warranted free from average unless general*," and the clause in the rider, "Free from particular average, but liable for absolute total loss of a part, if amounting to five (5) per cent." Which clause of course supersedes the clause contained in the body of the policy.

In England, where the rule relating to constructive total loss is as above stated, it has been held that in a policy of insurance containing either of the clauses, "Free of partial loss," "Free of particular average," "Against total loss only," and "Against average unless general," the plaintiff can recover for a constructive total loss, provided there is an abandonment duly made.

In the case of Farnsworth *v.* Hyde, L. R. 2 C. P. 204, the Court held that there was a constructive total loss of cargo even under the English rule, provided the cost of saving the property, together with the extra freight of carrying the same forward, and other expenses, amounted to more than the value of the cargo (less the original freight) at the port of destination.

In Roseth *v.* Alliance Mar. Ass. Co., 11 C. B. 176, approved in the above case, the cargo insured was a cargo of wheat with a memorandum clause, "Warranted free from average unless general."

The Court there used the following language, p. 190:—

"To determine this question, the jury must ascertain the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of trans-shipping it into a new bottom, and the cost of the difference of transit, if it can only be effected at a higher than the original rate of freight. Add to these items the salvage allowed, in proportion to the value of the cargo saved, and the loss will be total, if the aggregate exceeds the value of the cargo at Liverpool, the port of discharge."

Reiner *v.* Ringrose, 6 Exch. 263–267, was insurance on a cargo of corn, the policy containing the warranty "free from average."

"It was suggested, and we all think that the suggestion is well founded, that it would have been a total loss if the corn had been in such a state in the port of Norway as that, when brought home, it could not have been sold for an amount exceeding the expenses of drying and bringing it home. And this is so, for it proceeds upon the same principles which make it a total loss if the expense of repairing and bringing home a ship would exceed the value when brought home." (In this case there was no salvage service.)

That the words "against total loss only" includes a constructive total loss, see

Adams *v.* McKenzie, 32 L. J., N. S. 92.

The rule in England being that there is a constructive total loss of vessel, provided the cost of saving and repair amounted to more than the value of the vessel after repair, and, in the case of cargo, that the cost of saving it and reshipping it and sending it forward amounts to more than its value at the original port of destination, provided an abandonment is duly or seasonably made.

It is true that in an early case, that of Cocking *v.* Fraser, 4 Douglas, 295, Lord Mansfield used the following language: "Absolute destruction of the goods by the wreck of the ship" would amount to a total loss on articles insured "free of average," even at an intermediate port.

This case has, however, been overruled in England by the cases cited above and also by other decisions cited and explained in Arnould on Insurance (Perkins' Ed.), Vol. II, p. 1026.

Law in the United States.

The law in the United States, by a long list of decisions relating to both vessel and cargo, has been settled in this regard.

Under the usual form of policy the assured can recover for a constructive total loss of cargo, provided there has been an abandonment duly made, if the loss or injury sus-

tained amounts to fifty per cent of the value fixed in the policy, or provided the property will not bring fifty per cent of such valuation in case of cargo.

Kettell *v.* Alliance Ins. Co., 10 Gray, 144.
Delaware Ins. Co. *v.* Winter, 38 Penn. St. 176.
Patapsco Ins. Co. *v.* Southgate, 5 Peters, 604.
Moses *v.* Columbian Ins. Co., 6 Johns, 219.

In determining the damage or injury to the property the cost of saving the property, or raising it, if submerged and bringing into port, will be taken as a part of the damage or injury in order to make up the necessary fifty per cent.

Ellicott *v.* The Alliance Ins. Co., 14 Gray, 318.
Wallace *v.* Thames & Mersey Ins. Co., 22 F. R. 66 (by Mr. Justice Matthews late of U. S. Supreme Ct.).
Tudor *v.* New England Ins. Co., 12 Cush., 554.

In Ellicott *v.* Alliance Ins. Co., 14 Gray, 318, as to expense of raising etc., the Court says, p. 320:—

"But in either case the fact of a total loss is to be decided by the condition of the property at the time to which the abandonment relates. If, at that time, the vessel cannot be recovered and repaired at an expense not exceeding half her value, the right of abandonment exists, and the expense incurred by the underwriters afterwards are for the purposes of salvage, and cannot affect the change of property which the abandonment creates."

See also

Northwestern Trans. Co. *v.* Continental Ins. Co. 24 Fed. R. 171,

where the same rule was applied by Judge Brown, now of this Court.

There is nothing in this policy which calls for the application of a different rule.

The clauses, "Free of particular average," "Free of partial loss," "Free of average unless general," or "Again

total loss only," are all clauses of long standing and have the same meaning in the United States as in England.

If goods or vessels are insured in a policy containing any one of these clauses, yet if they are damaged to the extent of fifty per cent and there has been a seasonable abandonment, then the assured can recover for a total loss.

See where the words used were "Against total loss only."

Heebner *v.* Eagle Ins. Co. 10 Gray, 131.

"Free of partial loss."

Kettell *v.* Alliance Ins. Co., 10 Gray, 144.

"Free of partial loss."

Mayo *v.* India Mut. Ins. Co., 152 Mass. 172, 174–175.

The latter case was on a policy of insurance where the words used were "Free of partial loss," and where there was an abandonment of the cargo which afterwards arrived in the port of destination *in specie*, and very little diminished in quality.

The Court held that the plaintiff could recover a constructive total loss, as the loss was fifty per cent, and an abandonment was duly made before arrival.

In Heebner *v.* Eagle Ins. Co., 10 Gray, 131, the Court says that insurance against "total loss only" covers a case of *constructive total loss*. This case also deals with the construction of a policy signed by a president or secretary in another State, but signed or countersigned by an agent here, and decides that such a policy will be construed according to the law of Massachusetts.

Greene *v.* Pacific Ins. Co., 9 Allen, 217,

where the words were "against total loss only," on ship and whaling outfits the Court applied the same doctrine, and held that a total loss of outfits could be recovered, there being a total loss of the ship.

In Kettell *v.* Alliance Ins. Co., 10 Gray, 144, the words used were, "Against partial loss."

This was a case of tin plates where the cargo was

abandoned near the port of damage. Here a distinction is drawn between tin plates and the usual memorandum articles such as are perishable in their own nature.

The valuation in the case at bar is entire, and that must govern.

Pierce *v.* Columbian Ins. Co., 14 Allen, 320.

The words used are "Free of particular average," stated to be the same as "Against total loss only."

Gray, J., says, "And by the American law, if goods other than memorandum articles are injured by the perils of the sea to more than half their value, it is a constructive total loss, and authorizes an immediate abandonment and recovery against the insurers."

The learned circuit judge does not follow the reasoning of Judge Shaw in the case of Kettell *v.* Alliance Ins. Co. (*supra,*) (Record p. 139), and this is owing to the fact that he does not apply the term "memorandum articles" in the way that the term is commonly used, and as used by Judge Shaw in that case.

The terms "memorandum articles" and "common memorandum articles" have a well-known meaning in the law of marine insurance, as being "articles which are perishable in their own nature."

It was first introduced in Lloyd's policies in England in 1749.

The form of the "common memorandum" is found in all the old text-books on marine insurance.

The stipulation in use in this country is generally called the "common memorandum," and the articles enumerated in it are called "memorandum articles."

2 Arnould on Insurance, Perkins' Ed., 852, 856.

It was with the knowledge of the history, and the commonly understood use of the term, that Judge Shaw spoke of "memorandum articles."

The learned circuit judge, on page 139, says: —

"He undertook to make a distinction between the

articles found in the memorandum clause proper, and articles found in a rider."

This is not a correct statement, as an examination of the case shows that the word on which the defendant relied *was not in a rider*, but was in the body of the policy.

That the learned chief justice was speaking with a full knowledge of the subject we refer to his own language in that opinion, which is as follows;—

On page 152: "One reason given why a constructive total loss should not be made up of damage on memorandum articles, so as to allow of an abandonment for damage, was that in the case of mere damage it was so difficult to distinguish between that part of visible damage which proceeds from internal tendency to decay, and that part from perils of the sea, that it must have been the intention of the contracting parties to exclude it altogether. In this respect there is a marked difference between tin and brass goods liable to tarnish, and memorandum articles liable to decay.

On page 154: "We have not thought it necessary to review the English cases on this subject, many of which were cited in the argument, for the reason already given, that they all related to memorandum articles, and not, like this, to a specific exception of goods liable to particular damage, but not perishable in their nature, and not embraced in the common memorandum."

On page 155: "There is no adjudged case which holds that when such goods, liable to particular damage, but not to decay or destruction by sea water, are shipped and insured, with an exception of liability for the partial loss, and the goods are damaged to more than half their value by a sea peril, the goods left at an intermediate port, so that by the established rule of law here the assured has a right to abandon, and he does seasonably abandon, this is not a legal total loss, for which he may recover."

The same line of reasoning is given in the case of Mayo *v.* India Mutual Ins. Co., 154 Mass. 172, and Judge Gray (now of the Supreme Court of the United States) uses the words "memorandum articles" in the same way in Pierce *v.* Columbian Ins. Co., 14 Allen, 320.

The reason for such a distinction is clear; the common memorandum articles are those which are perishable in their own nature, or are such that in case of being in contact with water, or in case of delay, will deteriorate very fast, so that it is difficult to determine whether the loss has been occasioned by sea peril, by the nature of the article, or the delay of forwarding it.

The Circuit Court and the Circuit Court of Appeals for the First Circuit both find that, in the State Court of Massachusetts, the plaintiff could recover, but state that the Supreme Court of the United States has examined the question, arrived at a contrary conclusion, and that it is therefore bound by the decisions of this Court.

In support of this statement it cites four cases:—

Marcadier *v.* Chesapeake Ins. Co., 8 Cranch. 39.
Moreau *v.* U. S. Ins. Co., 1 Wheaton, 219.
Hugg *v.* Augusta Ins. Co., 7 Howard, 597.
Insurance Co. *v.* Fogarty, 19 Wallace, 640.

It is our contention that such is not the fact, as an examination of the cases will show.

Marcadier *v.* Chesapeake Insurance Co. (*supra*).

In this case, decided in 1814, where there was an attempt to recover a constructive total loss on the whole cargo, composed partly of goods that were perishable in their own nature, and written free of average, it was held that if the loss on the goods not covered by the above clause did not amount to a constructive total loss, at *the port of refuge*, that the loss on the memorandum articles, by reason of deterioration, could not be added in order to make a constructive total loss on the whole cargo.

The Court used the following language in its decision:—

"The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles; and in order to effectuate this right, it is necessary, where a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo

at an intermediate port to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles."

"In this way, full effect is given to the contract of the parties. *The underwriter is never made responsible for partial losses on memorandum articles, however great; and the technical total losses, for which alone he can be liable, are such as stand unaffected by the perishable nature of the commodity which he insures.*"

"Admitting, therefore, the rule to be correct, that the party had a right to abandon where the depreciation exceeds a moiety of the value, the plaintiff has not brought himself within that rule, as applied to a cargo of a mixed character like the present." (*Supra.*)

The case of Moreau *v.* United States Insurance Company was an insurance on a cargo of corn, an article perishable in its own nature, and a common memorandum article. The vessel experienced heavy weather on a voyage from Baltimore to Lisbon. On December 19 the vessel was driven ashore at Lisbon. The cargo was wet, and was taken out and carried to Lisbon in lighters, and landed at Lisbon on the 22d of December, the cargo bringing less than half its invoice value. On March 11, 1813, the plaintiff offered an abandonment, which was refused by the insurance company.

In that case the Court says: —

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be a total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss."

"If the question turn upon the totality of the loss, unconnected with the subject of loss by deterioration of the cargo in value, or reduction in quantity, there is no difference between memorandum and other articles. If the loss be total in reality, or is such as the insured is permitted to treat as such, he is entitled to abandon and recover as for a total loss in the case of memorandum articles, but always with this exception, that he is not permitted to turn a partial into a total loss."

The two cases of Marcadier *v.* Chesapeake Ins. Co., 8 Cranch. 39, decided in 1814, and Moreau *v.* U. S. Ins. Co., 1 Wheaton, 219 (1816), we contend, do not apply to the case at bar for other reasons.

The dicta in these cases are clearly founded upon what the Court considered to be the English dictum as stated in Cocking *v.* Fraser (*supra*), and which doctrine has since been refuted by the English courts. For a discussion and history of this matter see 2 Parsons, Marine Insurance, 102.

These two decisions, however, are at most mere dicta. The abandonment in both cases was made too late, inasmuch as the insured property was not in peril, but had arrived at the port of destination when the abandonment was made.

So that even under the later decisions of the Supreme Court of Massachusetts the plaintiff could not have recovered.

Forbes *v.* Manf. Ins. Co., 1 Gray, 371.

The case of Hugg *v.* Augusta Ins. Co. (*supra*) was a case of insurance on the freight of a bark loaded with hides and jerked beef. The vessel received injury and was saved by salvors.

The freight policy contained a clause which made jerked beef "*free of average.*"

It was there held that there could be a recovery for a total loss of freight if the goods on the vessel were lost by any of the perils insured against.

In that case it is expressly stated that it is not the intention of the Court to pass on the question as to the respective rights of the owner of the cargo and its insurer.

The Court uses this language, viz.:—

"That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at

Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination."

The case of Great Western Ins. Co. *v.* Fogarty (*supra*) was insurance on a sugar packing machine "free from particular average," where parts of the machinery were lost, but more than one-half in amount and value was saved. "That which was saved was much broken and rusted, so that it would cost more to repair it, polish it, and put it in order for use, than to buy a new machine."

In that case there was a loss of more than fifty per cent of the value of the property prior to the arrival at the port of destination; but no abandonment was made until after the cargo was landed. The Court held that the plaintiff could not recover for a total loss, as the goods were not in peril when the abandonment was made. The application of the same rule to the two cases cited from the Supreme Court of the United States would cause the decisions to be the same as were rendered.

It is stated in Phillips on Insurance (5th ed., Vol. II, p. 316, § 614) that where in a policy goods are insured "free from average," according to all analogy and to be consistent the rule as to constructive loss should be the same as though the words were not used.

It is true that in the same work the law has been stated to be otherwise; but the book was published prior to the Massachusetts decisions above cited, and relies wholly upon the two cases, Marcadier *v.* Chesapeake Ins. Co. and Moreau *v.* U. S. Ins. Co.

In Marcadier *v.* The Chesapeake Ins. Co. (*supra*) the Court uses the following language, viz.: —

"It seems now clear that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination. In such a case, although the ship be in a capacity to perform a voyage, yet if the voyage be not worth

pursuing, or the thing insured be so damaged or spoiled as to be of little or no value, the insured has a right to abandon the projected adventure, and throw upon the underwriter the unprofitable and disastrous subject of insurance. *It has therefore been held that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of total loss.*"

In that case the Court gives its reasons why *common memorandum articles perishable in their own nature should be subject to a different rule.*

In this case the Court states that no rule seems to be established as to what constitutes a constructive total loss of goods, but recognizes the American rule as laid down by Chief-Justice Parsons in Massachusetts.

The doctrine of constructive total loss as applied to either cargo or ship had not been at that time fully developed in this country, as a careful reading of the above cases will show.

It is clear, therefore, that the cases in the Supreme Court of Massachusetts and in the Supreme Court of the United States are not in conflict, and that the rule established by both of these Courts can be thus briefly stated: —

That if the goods are insured "free of particular average," "free of partial loss," "against total loss only," or "warranted free from average unless general," there can be a recovery for a constructive total loss, provided there is a seasonable abandonment and a loss by perils insured against amounting to more than fifty per cent of the valuation of the goods insured.

That in case no abandonment is made until after the goods have arrived at the port of destination, the abandonment is not seasonably made, and the plaintiff cannot recover.

That in case of common memorandum articles perishable in their own nature, there can be no recovery for deterioration of the articles at a port of call or by mere delay in the

voyage, is all that the cases in the Supreme Court of the United States decide, and the Court in the decisions by express language clearly distinguishes between articles perishable in their own nature and articles not so perishable.

The cases in the Supreme Court of the United States were before Judge Shaw when he made his decision in the case of Kettell *v.* Alliance Ins. Co. (*supra*) as the report will show.

In the case at bar the articles are not memorandum articles and the loss was caused by perils of the sea, the abandonment was duly made at the time the goods were in peril, and the plaintiff should be entitled to recover for a constructive total loss which the jury found it had suffered.

The circuit judge states (Record, p. 138) :—

"The rule is an exceptional one, and against the general principles of underwriting. Nevertheless, there are these decisions of the Supreme Court which never have been modified by that Court as far as I can find."

II.

That it was a question of fact for the jury as to whether on all the evidence the defendant company had not accepted the abandonment.

It is true that the agent of the defendant company, on May 1, 1893, wrote a letter in which he declined to accept the abandonment.

Exibit 6, Record, p. 115.

He uses, however, these words in addition, "I await protest for particulars, after receipt of which can judge better regarding the loss."

Which clause shows that he desired to have the matter remain open.

An abandonment is to be governed by the facts existing at the time it is made.

This doctrine has often been stated by the Supreme Court of the United States.

Orient Ins. Co. *v.* Adams, 123 U. S. 67:

"That the abandonment of a vessel for a total loss, made in good faith at a time when it was in reasonable probability impracticable to recover and repair it, and when the damage by peril insured against amounted in all probability to fifty per cent, is a valid abandonment"; although it afterwards proved that the cost of repairs, etc., was less than fifty per cent.

In Marcadier *v.* Chesapeake Ins. Co., 8 Cranch, 39, J. Story says: —

"It now seems clear that a technical total loss may arise from the mere deterioration of a cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination." Again "It has therefore been held, that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of total loss."

But although an abandonment may be refused by the underwriter, it may be afterwards accepted by him, although the acceptance is taken wholly from acts which may be done from which the jury may imply acceptance.

In the case at bar the acts done by the defendant company are sufficient to warrant the jury in finding that there was an acceptance of the abandonment.

In Peels *v.* Merchants Ins. Co., 3 Mason, 27-85, Mr. Justice Story discusses what are acts of ownership which will amount to an acceptance of an abandonment. In Pheonix Ins. Co. *v.* Copelin, 9 Wall. 461, which was a case in point, the Court uses the following language: "It is well settled, however, that an offered abandonment may be accepted, even when the assured has no right to abandon, and, if accepted, it must be with its consequences, and an acceptance need not be expressly made. It may

even be refused, and yet the insurers by their conduct may make themselves liable for a total loss."

The question whether all the acts amount to an acceptance of the abandonment, is a question of fact for the jury.

See Richelieu & C. Nav. Co. *v.* Boston Marine Ins. Co., 136 U. S. 408.

The same doctrine is stated in

Northwestern Trans. Co. *v.* Continental Ins. Co., 24 Fed. Rep. 171 (by Judge Brown now of U. S. Sup. Court).

Here the insurance was against "total loss and general average."

The vessel was raised by the underwriters and tendered back to the owners. The abandonment was timely. Held, that on the facts there was an acceptance of the abandonment as a matter of law. Cited by approval in the former case.

In the case of Carr *v.* Security Ins. Co., 109 N. Y. 505, where the language was "against actual total loss only," the Court uses the following language: —

"The underwriters having elected to take possession of the vessel under the rescue clause, it is plain, we think, that they could neither sell the vessel voluntarily, nor permit it to be sold under judicial process, in satisfaction of a lien which they had created, without thereby making the loss to the plaintiff an 'actual total loss,' whatever may have been its original character. The sale under the decree in admiralty divested irrevocably the title of the plaintiff."

The facts in Munroe *v.* British Ins. Co., 5 N. S., Ap. 179–193, 52 Fed. Rep. 777, are entirely different.

In the case at bar the underwriters create a lien on the goods by sending them forward, — in fact, create a greater liability than the original charter, and for this lien the property was sold under judicial process.

The cases on which the defendant relies are not in con-

flict with the doctrine of Mayo *v.* India Ins. Co., 172 Mass., and the other cases cited there.

In the case of Munroe *v.* British Ins. Co. (*supra*), the words used are "against absolute total loss of vessel and animals only." But the words here are greatly different.

At Velasco this whole cargo sold for the sum of $10,000, so that the expense of saving the wire and bringing it to a port of sale, without counting the expense of discharging and selling the same, amounted to over $2,000 more than the cargo was worth as shown by the sale.

The plaintiff also produced as witnesses experts who heard all of the evidence in the case and who testified that this sum was much in excess of what the cargo was worth.

Parmalee, Record, p. 80, Int. 64.

And who testified that the cargo would be commercially worthless, as the wire would be destroyed for the purpose intended.

Parmalee, Record, p. 76.
Clements, Record, p. 84.
D'Ewart, Record, p. 83.

And they all testify that it would have cost more to recondition the wire than it would cost to make new barbed wire.

This is clear evidence not merely of a constructive total loss but of an actual total loss.

In England under the decisions this would constitute a case of actual total loss, as the cost of saving the property alone amounted to more than the property was worth after it was saved.

In the case of Crossman *v.* B. A. Ass. Co., L. R. 13 Ap. Cas. 161, in the Privy Council of England, which was a case where the property was sold by reason of perils insured against, the Court held that it constituted an actual total loss. The Court uses the following language, viz., p. 169:—

"It was admitted that no formal notice of abandonment

was given, and it is unnecessary, in the view which their Lordships take, to determine whether what took place between the owners and the underwriters substantially amounted to such notice. Their Lordships are of opinion that after the sale under the decree of the Court of Admiralty there was an actual total loss."

"To constitute a total loss within the meaning of the policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed. It may, as in the case of capture and sale upon condemnation, remain in its original state and condition. It may be capable of being repaired if damaged. It may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated."

This case shows the extent to which the doctrine has been carried in England as to "An actual total loss."

III.

That there is sufficient evidence to warrant a jury in finding an actual total loss of cargo.

In the case at bar, the cost of saving the cargo and bringing it to Key West, a port of safety, amounted to the sum of $9,393.15, and there were further expenses in Key West, amounting to the sum of about $1,190, making the total expenses of saving the property over $10,500.

All of the witnesses called in the case testify that there was no market for the cargo at Key West.

Hanna, Record, p. 86.
Mareno, Record, p. 89.
Williams, Record, p. 92.

The cargo was shipped by the Schooner "Cactus," at an expense for freight of $1,498.50, and for demurrage at Key West of $175, which, without any allowance for de-

murrage at Velasco, Texas, amounts to the sum of $1,673.50, which was the charge necessary to bring the cargo to a port where it could be sold; and it is acknowledged by all parties that Velasco, Texas, was as good a place to sell a cargo of barbed wire as any place in the United States.

Rice, Record, p. 26.

In the case of Wallerstein *v.* Columbian Ins. Co., 44 N. Y. 240, where the cargo was insured "free of particular average only," and where the cost of saving the cargo amounted to more than its value after it was saved, the Court held that it was a case of actual total loss.

In the case of Bullard *v.* Roger Williams Ins. Co., 1 Curtis, 148, Judge Curtis says: —

"If you should find, from the evidence in the case, that the injuries suffered by this brig from perils were so great that they could not be repaired so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, then this was a case of actual total loss, and no abandonment was necessary."

The same doctrine is laid down in the case of Insurance Co. *v.* Fogarty, 19 Wall. 640, where parts of machinery were lost. Briefly stated the doctrine is this: —

If the use of the property insured, for the purpose for which it is made, requires an expenditure greater than the property is worth after that expenditure, then it is the case of an actual total loss, and no abandonment is necessary.

In other words, as in England, if the value of the property is absorbed by perils insured against, and the cost of preservation and saving of the same, as well as bringing it to the port of destination, is more than the value of the property when saved and at the port of destination, it is a case of an actual total loss, and no abandonment is necessary.

In the case at bar the value of the property at the port

of destination did not amount to the sums thus paid. See also, to this point,

Kinsman *v.* China Mutual Ins. Co., 49 Fed. Rep. 876.

And this doctrine is founded on what a prudent, uninsured owner would do under the same circumstances.

We submit that there is also evidence that at least the wire damaged did not arrive *in specie* adapted for the purpose for which it was intended.

The same doctrine has been stated in another form in the case of Williams *v.* Kennebec Ins. Co., 31 Maine, 455.

The case of Hugg *v.* Augusta Insurance & Banking Company, 7 Howard, 595, is a case on a policy of insurance on the freight of the bark "Margaret Hugg," and the doctrine there stated, except as to the cases previously cited, refers only to what would constitute a total loss of a freight policy. It cannot have any application to the case at bar, because the nature of insurance on cargo can be of no importance in a suit on a freight policy.

The sale in the latter case was a voluntary one, not made by the underwriters, but by the direct act of the consignee.

This doctrine was stated in the case of Stringer *v.* Eng. & S. Mar. Ins. Co., L. R., 4 Q. B. 671, by the Court. that a constructive total loss by legal process might be occasioned, either by acts of the assured, or by acts which arose from perils against which they insured.

In the case at bar, the underwriters not merely worked under the sue and labor clause, but after the property insured was in a place of safety, *and after the voyage was abandoned by the owners of the Schooner "Benjamin Hale."* The underwriters without in anyway notifying the plaintiff, transshipped the cargo on another vessel under a different charter, and forwarded it to Velasco, Texas, creating burdens upon it which did not before exist. This was clearly an act of ownership exercised by them without

notice, by which liens were created which they have never offered to assume or pay.

It was for the liens thus created that the property was sold under the process of a Court of Admiralty.

IV.

The contract should be governed in this case by the law of Massachusetts.

The contract in the case was made in Massachusetts, and should therefore be governed by the law of Massachusetts.

Pierce *v.* Columbian Ins. Co. (*supra*).
Equitable Ass. Co. *v.* Clements, 140 U. S. 226.

In the case of Smith *v.* Tyson, 16 Peters, 1, where the decision of the State Court was not followed, the cause of action being on a bill of exchange which was negotiable in its nature, Judge Story uses the following language:—

"Undoubtedly, the decision of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

In Jackson *v.* Eden, 12 Wheaton, 153, a case on the construction of a clause in a will, A. devised certain land to his sons in fee and then added to his will, "If either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor," etc.

Per curiam: "After such a settled course of decisions, and two of them in the highest court of law in the State, upon the very clause in the will now under consideration, deciding that Joseph Eden did not take an estate tail, a contrary decision by this Court would present a conflict between the State Courts and those of the United States productive of incalculable mischief."

"It has been urged however, that this Court applies

this principle (that of following the State Court decisions) only to State constructions of their own statutes. It is true that many of the cases in which this Court has deemed itself bound to conform to State decisions, have arisen on the construction of statutes. But the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This Court adopts the State decisions because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law, as the statute law of the State when applied to the title of lands."

This doctrine has been considered by Prof. Thayer in a late article dealing with this subject, where the following language is used: —

"But there is another ground for coming into the courts of the United States. A case may come there, as this one has, not because of any question arising under the Constitution or laws of the United States, but simply because the plaintiff and defendant are citizens of different States or countries. In such a case, the Court is administering the law of the State. In this sort of case, the general rule is, that since the Court is applying the law of the State, it will follow, in determining what that law is, and construing it, the decisions of the highest court."

"But there are various qualifications of these doctrines. The most conspicuous of them is the principle of Swift *v.* Tyson, 16 Pet. 1 (1842), in which the novel and much contested doctrine was laid down, that upon questions of what are called general commercial law, the courts of the United States did not undertake to follow the State Courts. This declaration was not required for the decision of that case, but it has been followed and is an established rule in the United States jurisprudence. Its soundness in point of principle is, perhaps, open to question; at any rate, it is undergoing much criticism at the present day."

J. B. Thayer, on the case of Gelpcke *v.* Dubuque, in 4 Harv. Law Rev. 311.

In the case at bar, under the rule of construction laid

down by the highest courts both of Massachusetts and England, these questions should have been submitted to the jury to determine whether or not there was a constructive total loss.

The case was brought in the State Court, and if the Federal Court should give a different construction to this contract, then there would be a conflict of laws within the same jurisdiction.

Such a conflict is unnecessary and does not now exist. The distinction between the decisions of the Massachusetts Supreme Court and those of the United States Supreme Court is clear and has been drawn earlier in this brief. That such a distinction is recognized we think a careful reading of the cases of Marcadier *v.* Chesapeake Ins. Co. (*supra*), and Moreau *v.* U. S. Ins. Co. (*supra*) will show. *This distinction is expressly spoken of in all of the Massachusetts cases cited.*

The rules of law contended for by the plaintiff are those that apply to both vessel and cargo.

To have this policy of marine insurance construed as asked for by the defendant and as stated by the United States Circuit Court of Appeals would enable insurance companies to save a part of a cargo of general merchandise and escape a loss, as it is a well-known commercial fact that a policy like the one at bar is the only kind of policy on this kind of goods that can be obtained.

The rule that, where the loss is merely by reason of the inherent nature of the article insured, there cannot be a recovery, has been fully established by the courts long since the decisions of this Court in Marcadier *v.* Chesapeake Co. (*supra*) and Moreau *v* U. S. Ins. Co. (*supra*).

But where the loss as in this instance is by reason of marine perils insured against there should be a recovery.

In the case at bar the cargo was a total loss in value when the vessel was ashore and filled with water.

The cost of saving the cargo was more than its value after it was saved.

THE PURPOSE OF THE SAVING AND FORWARDING OF THE CARGO TO THE PORT OF DESTINATION WAS NOT IN ORDER TO SAVE PROPERTY BUT TO PREVENT THE PLAINTIFF FROM RECOVERING HIS INSURANCE.

If this is the rule of law that is to govern in every case of stranding, all that will be necessary for an insurance company to do will be to save some part of the cargo and send it forward, no matter at what cost.

This surely is not the intention of such a clause as free from partial loss.

The decision is contrary to the rule of law laid down by the courts in Massachusetts and in England, the *only courts that have* passed on this question.

We submit that a writ of certiorari should issue to the United States Circuit Court of Appeals in this case.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
of Counsel.

Supreme Court of the United States.

No. 203. OCTOBER TERM, 1898.

THE WASHBURN AND MOEN MANUFACTURING COMPANY,

Plaintiff,

v.

THE RELIANCE MARINE INSURANCE COMPANY (Limited),

Defendant.

PLAINTIFF'S BRIEF.

STATEMENT OF THE CASE.

This is an action at law on a policy of Marine Insurance.

On March 15, 1893, the Washburn & Moen Manufacturing Company took out a policy of marine insurance in The Reliance Marine Insurance Company (Limited) of London, England, in the sum of forty-eight thousand, eight hundred dollars ($48,800), on a cargo of wire from Boston to Galveston and or Velasco, Texas, on the Schooner "Benjamin Hale," the said wire being valued at the sum insured, the rate of premium being one and one-fourth (1¼) per cent, and amounting to the sum of six hundred ten dollars ($610), which premium was paid in cash by the plaintiff.

The policy contained the following clause stamped upon it in red ink, being what is known as a "rider," viz: —

"Free of particular average, but liable for absolute total loss of a part if amounting to five (5) per cent."

Copy of policy, Record, p. 83, Exhibit 1.

Also the clause is in the print in the body of the policy, "Memorandum. It is also agreed that * * * * * * wire of all kinds * * * * * are warranted by the assured free from average unless general."

The Schooner "Benjamin Hale" with the insured cargo on board, sailed from Boston in a good seaworthy condition on March 31, 1893, bound to Velasco, Texas and the policy duly attached.

On April 15, 1893, the schooner with the wire on board ran ashore on Bahama Bank and threw overboard about two hundred reels of barbed wire, which resulted in the schooner floating and proceeding on her voyage. On April 19, 1893, the schooner ran ashore on Bird Key, near Dry Tortugas, and at once filled with water and sank.

Record, p. 17.

On April 22, 1893, the master of the schooner went on a packet to Key West, where he arrived on Saturday, April 23, in the evening. On Monday, April 24, he sent a telegram to the Washburn & Moen Manufacturing Company. At the time that he sent the telegram he thought that the vessel and all the cargo on board was a total loss.

Record, p. 17.

This telegram is found on p. 90 of the Record, Exhibit 8, and is as follows: —

"April 24, 1893. Hale ashore, Tortugas. Full water. Badly broken up. Think total loss. John Hall."

On April 24, or the next day, Daniel N. Bates, representing the plaintiff, called at the office of Mr. Poole, the

agent of the defendant company in Boston, told him what he knew in regard to the trouble, and offered to abandon the cargo to the underwriters.

Record, p. 20.

That afterwards he consulted counsel, and as a result of that interview a letter of abandonment was sent to the agent of the defendant company, in which was enclosed a bill of lading and a copy of the invoice, which had been received in the meanwhile.

This letter of abandonment was written because Mr. Bates was told by his counsel that in the ordinary Boston form of marine insurance policy there was a clause requiring an abandonment to be made in writing and he did not have the policy with him at the time. The letter of abandonment was written on April 29.

See Record, p. 86, Exhibit 2.

The policy in the case at bar was not in the Boston form, so that an oral abandonment was sufficient.

After the abandonment to the defendant company the Washburn & Moen Manufacturing Company never exercised any control or management of the property whatsoever. The written offer of the Washburn & Moen Manufacturing Company to abandon was replied to by Mr. Poole, agent of the Insurance Company. The reply will be found in Record, p. 89, Exhibit 6.

On April 24 the master of the said schooner "Benjamin Hale," in company with the underwriter's agent who represented the Insurance Company, proceeded to the vessel, which was floated by wreckers on May 2 and brought to Key West. She arrived at Key West May 4, full of water, and was discharged on May 10, 1893.

Record, p. 17–18.

At Key West libels were filed in the United States District Court by a number of salvage claimants against both the vessel and cargo for saving the same, separate

libels being filed by the different sets of salvors. Under these libels for salvage the vessel was sold and the cargo was bonded by persons acting under the direction and in behalf of the Reliance Marine Insurance Company (Limited), which company also employed counsel to defend the salvage suits. These salvage suits were heard together and a decree was entered against both vessel and cargo, the decree against the cargo amounting to the sum of nine thousand three hundred ninety-three and fifteen one-hundredths dollars ($9,393.15), which sum, together with the expense of defending the suit and the expense of taking care of the cargo at Key West, was paid by the Reliance Marine Insurance Company (Limited). The sum paid in the Registry of the Court was nine thousand three hundred ninety-three and fifteen one-hundredths dollars ($9,393.15), together with the sum of eleven hundred dollars ($1,100).

Record, pp. 41 to 44,

in all the sum of ten thousand, four hundred ninety-three and fifteen one-hundredths dollars ($10,493.15).

In addition to the above there was paid by the defendant Company four hundred eighty-five dollars ($485.) to the agent to look after and protect the cargo at Key West, making the total expense of saving the cargo and putting it in a place of safety at Key West, the sum of ten thousand, nine hundred seventy-eight and fifteen one-hundredths dollars ($10,978.15).

The Schooner "Benjamin Hale" was sold by the U. S. Marshal under an order issued in the salvage suits, and her voyage was abandoned on or about June 15, 1893.

None of the owners purchased the vessel at the sale.

Record, p. 44.

Captain Hall, her master, left the Schooner "Benjamin Hale" on June 10, 1893, and proceeded to Boston, having no intention of returning, and leaving no person in charge of her as master; the vessel at that time being in charge of

the U. S. Marshal under an attachment and an order issued for her sale.

After the arrival of Captain Hall in Boston, at the request of the underwriters on the cargo, and at their solicitation, he signed a charter-party of the Schooner "Cactus" to carry the cargo from Key West to Velasco, and the cargo was loaded on board of the Schooner "Cactus" under the supervision of the general and special agent of the underwriters.

This charter-party was made after the sale of the "Benjamin Hale," and while the cargo was in a place of safety at Key West. The Schooner "Cactus" completed her loading on June 28, 1893, and proceeded to Velasco, Texas, where she arrived on July 14, 1893, and duly reported as ready to discharge cargo to the agent of the Washburn & Moen Manufacturing Company at that port, which agent, under instructions from his principals, refused to accept the cargo, and thereupon the master of the "Cactus" libelled the cargo for both freight and demurrage and sold the same; the cargo being purchased at that sale by a third party for the sum of ten thousand dollars ($10,000).

Record, p. 53.

The charter-party of the Schooner "Cactus," which is found on page 92, Exhibit 10, of the Record, differs from the original charter-party of the "Benjamin Hale," Exhibit 7, page 89 of the Record, in the following particulars:—

The rate of freight is the same from Key West to Velasco as from Boston to Velasco. In the charter of the "Benjamin Hale" no time is fixed for the loading or discharging of the cargo, whereas it is specified in the charter of the "Cactus" that she shall load in seven running days and that she shall discharge at Velasco in five running days. The loading of the cargo was done under the supervision of the underwriters, Captain Hall having left the vessel and leaving no one in charge of her or the cargo except the agent of the underwriters. Before the charter

of the Schooner "Cactus," which was made in Boston, the captain had abandoned the voyage.

Under the said charter-party of the "Cactus" the rate of demurrage was fifty dollars ($50) per day, and the "Cactus" was delayed in loading the cargo at Key West three and one-half (3½) days, causing a demurrage in the sum of one hundred and seventy-five dollars ($175), all of which accrued prior to the schooner leaving Key West; and in Velasco the delay in discharging was fifteen and one-half (15½) days, making the amount of the charter, together with the demurrage, the sum of three thousand, one hundred forty-eight and fifty-four one-hundredths dollars ($3,148.54).

The Washburn & Moen Manufacturing Company were not told of the charter of the Schooner "Cactus," nor were they in any way informed of the action that was being taken by the defendant company in forwarding the cargo to Velasco, Texas, although they were within easy communication of the defendant, and the property at Key West was in a place of safety.

When the schooner "Cactus" left Key West, there was a charge for one hundred seventy-five dollars ($175) demurage on the cargo, and seven hundred dollars ($700) more freight to be paid upon arrival at Velasco than if the cargo had been carried there by the schooner "Benjamin Hale."

Upon the arrival of the schooner "Cactus" at Velasco, the master of the "Cactus" libelled the cargo for freight and demurrage and sold the same, leaving a balance in the Registry of Court, after paying his claim, costs and expenses, five thousand, three hundred sixty nine and twenty three one-hundredths dollars ($5,369.23).

This charter-party of the "Cactus" was entered into by the defendant Insurance Company without any request on the part of the Washburn & Moen Manufacturing Company, and without their knowledge. Upon the refusal of the defendant after due proof of loss and interest to pay the loss claimed by the plaintiff, suit was brought in the

Superior Court of Massachusetts, but upon the petition of the defendant and on the ground of diverse citizenship the case was removed to the United States Circuit Court for the District of Massachusetts. In the United States Circuit Court when the case was tried, the jury made a special finding that there was a constructive total loss of the cargo by perils insured against.

Evidence was introduced by the plaintiff that the cost of saving the property and landing it at Key West was more than the value of the property at Key West.

Evidence was introduced by the plaintiff that the cost of saving the property and forwarding it to the port of destination was more than the value of the property at the port of destination.

There was no question about the abandonment being seasonable, and no question but that the loss insured against exceeded fifty per cent of the value of the cargo.

The judge of the Circuit Court ruled that there was not sufficient evidence to warrant a jury in finding that there was a constructive total loss by reason of the clause in the policy "free of particular average."

The Court, although requested by the plaintiff, declined to allow the case to go to the jury on any of the above grounds, ruling:—

(1) That there was not sufficient evidence to warrant a jury in finding that there was an absolute total loss.

(2) That there was not sufficient evidence to warrant a jury in finding that there had been an acceptance of the abandonment.

(3) That the plaintiff could not go to the jury on the question whether or not there was a total loss, either absolute or constructive.

To each and all of which rulings and refusals to rule, the plaintiff duly excepted; the exceptions being found on pages 99 to 101 on the Record.

The plaintiff applied for a writ of error to the United States Circuit Court of Appeals for the First Circuit, which

writ was granted and filed, and at the same time filed its Assignment of Errors, which is found on page 103, and incorporates in substance the instructions prayed for by the plaintiff, which were refused at the trial of the case.

This Assignment of Errors was as follows:—

1. In not allowing the case to go to the jury on the question as to whether or not there was a constructive total loss.

2. In not allowing the case to go to the jury on the question as to whether or not there was an absolute total loss.

3. That the Court erred in not ruling that it was a question of fact for the jury as to whether there were such acts done and instructions given by the defendant, its servants and agents, as amounted to an acceptance of the abandonment.

4. That the Court should have ordered on the whole evidence in the case a verdict for the plaintiff for the amount sued for.

5. That the Court should have ruled that the sale of the cargo at Velasco, Texas, under judicial process, deprived the plaintiff of the property, and made a total loss of the cargo under the policy.

6. That the Court should have ruled that if by reason of the perils insured against there was damage or loss to the property insured in excess of fifty per cent of its value as given in the policy, and that an abandonment was duly made before the property was in a place of safety, the plaintiff could recover a total loss.

7. That the Court erred in not allowing the case to go to the jury on the question as to whether or not there was a total loss either absolute or constructive.

8. That the Court erred in not allowing the case to go to the jury on the question as to whether or not the defendant had accepted the abandonment of the cargo made by the plaintiff.

In the case at bar the plaintiff was prevented from going to the jury on the question as to whether or not there was a total loss under the policy, and the other errors refer simply to different phases of the same question, which were duly presented to the Court at the trial of the case.

It was the contention of the plaintiff in the Circuit Court and the Circuit Court of Appeals that there was sufficient evidence to warrant a jury in finding that the Insurance Company was indebted to them under the policy to the full amount of the same, and for the following reasons: —

I. That there was evidence sufficient to warrant a jury in finding that there was an absolute total loss of the property.

II. That there was sufficient evidence to warrant a jury in finding that there was an abandonment duly made, and an acceptance of the abandonment on the part of the defendant company.

III. That the Circuit Court should have ruled that the plaintiff was entitled to recover for a constructive total loss under the policy.

IV. That there was a loss of property by judicial process for which the defendant company was liable.

The United States Circuit Court of Appeals for the First Circuit affirmed the judgment of the Circuit Court, whereupon the plaintiff petitioned to this Court for a writ of *Certiorari*, which was granted February 4, 1898.

ARGUMENT.

There was evidence presented to the jury that the cargo of barbed wire insured aboard of the Schooner "Benjamin Hale" was valued in the policy in the sum of $48,800. That the schooner struck a rock off the Florida Keys, filled with water and sank, so that the wire became entirely

submerged. That while the vessel and cargo were both submerged and apparently never could be saved, the insured made an abandonment in due form to the Insurance Company. That afterwards the property was saved, brought to Key West and put in a place of safety. That the cost of saving the property, together with the expenses incident to the same, amounted to more than the value of the wire after it was saved. That the property was afterwards forwarded by the Insurance Company in another vessel to the port of destination, and that by reason of that action a lien was incurred which resulted in the sale of the property by judicial process and thereby its loss to the plaintiff. That there was evidence before the jury that the property after being wet in salt water was of no commercial value. That the loss occasioned by perils of the sea alone amounted to more than one-half the value of the property as fixed in the policy. That the plaintiff never exercised any acts of ownership over the property after the abandonment was made by it, and it is claimed that sufficient evidence was introduced to warrant the jury in finding that there was an acceptance of the abandonment by the Insurance Company.

That the Circuit Court ruled, and the ruling was affirmed by the Circuit Court of Appeals, that the question as to whether or not there was a total loss either absolute or constructive, or whether or not there was an acceptance of the abandonment, was something which the jury could not pass upon. The plaintiff contended that they were questions of fact to be submitted to the jury. In other words, the Courts both ruled that on all the evidence in the case there was not sufficient evidence to warrant the jury in finding that there was a total loss under the insurance policy or that the Insurance Company was in any way liable for the amount sued for.

The question presented is: Was the plaintiff, on all of the evidence in the case, entitled to recover for a total loss of the cargo under the terms of the policy issued by the defendant company?

It is agreed by the defendant that it could recover but for certain clauses in the policy. The plaintiff contends that there was sufficient evidence to entitle it to recover on either of three grounds: —

1. *That there was a constructive total loss of the cargo and a seasonable abandonment.*

2. *That on the evidence the jury would be entitled to find that there was an absolute total loss.*

3. *That on the evidence the jury would be entitled to find that there was an acceptance of the abandonment.*

I.

That the plaintiff can recover for a constructive total loss under this policy.

This requires a consideration of what is a constructive total loss of cargo and when it is to be applied.

The Doctrine of Constructive Total Loss.

There are two rules as to what is a constructive total loss under a policy of marine insurance.

1. The English rule is that, in the case of a vessel, if the amount of repairs caused by perils insured against is more than her value, or in the case of cargo, if the cost of saving and forwarding the same amounts to more than the value of the same at the port of destination, then, if there is an abandonment seasonably made, there can be a recovery for a total loss.

2. The rule in the United States in the case of both vessel and cargo is that, if the damage by perils insured against is in excess of one-half of the value, and an abandonment is seasonably made, there is a constructive total loss.

This doctrine was first laid down in this form in Massachusetts in 1810 by C. J. Parsons in

Lincoln *v.* Kennebec Ins. Co., 6 Mass. 479.

This doctrine was first applied to the case of cargo by the Supreme Court of the United States at a later date.

If, therefore, in the case at bar there were no restrictive clauses, there could be a recovery for a constructive total loss, as the abandonment was seasonably made.

The only clauses which could govern are either the clause in the body of the policy, where all kinds of wire, etc, are "*warranted free from average unless general,* and the clause in the rider, "Free from particular average, but liable for absolute total loss of a part, if amounting to five (5) per cent." Which clause, of course, supersedes the clause contained in the body of the policy.

In England, where the rule relating to constructive total loss is as above stated, it has been held that in a policy of insurance containing either of the clauses, "Free of partial loss," "Free of particular average," "Against total loss only," and "Against average unless general," the plaintiff can recover for a constructive total loss, provided there is an abandonment duly made.

In the case of Farnsworth *v.* Hyde, L. R. 2 C. P. 204, the Court held that there was a constructive total loss of cargo even under the English rule, provided the cost of saving the property, together with the extra freight of carrying the same forward, and other expenses, amounted to more than the value of the cargo (less the original freight) at the port of destination.

In Roseth *v.* Alliance Mar. Ass. Co., 11 C. B. 176, approved in the above case, the cargo insured was a cargo of wheat with a memorandum clause, "Warranted free from average unless general."

The Court there used the following language, p. 190:—

"To determine this question, the jury must ascertain the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of trans-shipping it into a new bottom, and the cost of the difference of transit, if it can only be effected at a higher than the original rate of freight. Add to these items the salvage allowed, in proportion to the value of the cargo saved, and the loss

will be total, if the aggregate exceeds the value of the cargo at Liverpool, the port of discharge."

Reiner *v.* Ringrose, 6 Exch. 263–267, was insurance on a cargo of corn, the policy containing the warranty "free from average."

"It was suggested, and we all think that the suggestion is well founded, that it would have been a total loss if the corn had been in such a state in the port of Norway as that, when brought home, it could not have been sold for an amount exceeding the expenses of drying and bringing it home. And this is so, for it proceeds upon the same principles which make it a total loss if the expense of repairing and bringing home a ship would exceed the value when brought home." (In this case there was no salvage service.)

That the words "against total loss only" include a constructive total loss, see

Adams *v.* McKenzie, 31 L. J. N. S., 92.

The rule in England being that there is a constructive total loss of vessel, provided the cost of saving and repair amounted to more than the value of the vessel after repair, and, in the case of cargo, that the cost of saving it and re-shipping it and sending it forward amounts to more than its value at the original port of destination, provided an abandonment is duly or seasonably made.

It is true that in an early case, that of Cocking *v.* Fraser, 4 Douglas, 295, Lord Mansfield used the following language: "Absolute destruction of the goods by the wreck of the ship" would amount to a total loss on articles insured "free of average," even at an intermediate port.

This case has, however, been overruled in England by the cases cited above, and also by other decisions cited and explained in Arnould on Insurance (Perkins' Ed.), Vol. II, p. 1026.

Law in the United States.

The law in the United States, by a long list of decisions relating to both vessel and cargo, has been settled in this regard.

Under the usual form of policy the assured can recover for a constructive total loss of cargo, provided there has been an abandonment duly made, if the loss or injury sustained amounts to fifty per cent of the value fixed in the policy, or provided the property will not bring fifty per cent of such valuation in case of cargo.

Kettell *v.* Alliance Ins. Co., 10 Gray, 144.
Delaware Ins. Co. *v.* Winter, 38 Penn. St., 176.
Patapsco Ins. Co. *v.* Southgate, 5 Peters, 604.
Moses *v.* Columbian Ins. Co., 6 Johns., 219.

In determining the damage or injury to the property, the cost of saving the property, or raising it, if submerged, and bringing into port, will be taken as a part of the damage or injury in order to make up the necessary fifty per cent.

Ellicott *v.* The Alliance Ins. Co., 14 Gray, 318.
Wallace *v.* Thames & Mersey Ins. Co., 22 F. R. 66 (by Mr. Justice Matthews, late of U. S. Supreme Court).
Tudor *v.* New England Ins. Co., 12 Cush., 554.

In Ellicott *v.* Alliance Ins. Co., 14 Gray, 318, as to expense of raising, etc., the Court says, p. 320: —

"But in either case the fact of a total loss is to be decided by the condition of the property at the time to which the abandonment relates. If at that time the vessel cannot be recovered and repaired at an expense not exceeding half her value, the right of abandonment exists, and the expenses incurred by the underwriters afterwards are for the purposes of salvage, and cannot affect the change of property which the abandonment creates."

See also

Northwestern Trans. Co. *v.* Continental Ins. Co., 24 Fed. R., 171.

where the same rule was applied by Judge Brown, now of this Court.

There is nothing in this policy which calls for the application of a different rule.

The clauses, "Free of particular average," "Free of partial loss," "Free of average unless general," or "Against total loss only," are all clauses of long standing, and have the same meaning in the United States as in England.

If goods or vessels are insured in a policy containing any one of these clauses, yet if they are damaged to the extent of fifty per cent and there has been a seasonable abandonment, then the assured can recover for a total loss.

See where the words used were "Against total loss only."

Heebner *v.* Eagle Ins. Co. 10 Gray, 131.
"Free of partial loss."

Kettel *v.* Alliance Ins. Co., 10 Gray, 144.
"Free of partial loss,"

Mayo *v.* India Mut. Ins. Co., 152 Mass. 172, 174–175.

The latter case was on a policy of insurance where the words used were "Free of partial loss," *and where there was an abandonment of the cargo which afterwards arrived in the port of destination in specie, and a very little diminished in quality.*

The court held that the plaintiff could recover a constructive total loss, as the loss was over fifty per cent, and an abandonment was duly made before the arrival of the goods at the port of destination.

In Heebner *v.* Eagle Ins. Co., 10 Gray, 131, the Court says that insurance against "total loss only" covers a case of *constructive total loss.* This case also deals with the construction of a policy signed by a president or secretary in another State, but signed or countersigned by an agent here, and decides that such a policy will be construed according to the law of Massachusetts.

Greene *v.* Pacific Ins. Co., 9 Allen, 217.

where the words were "against total loss only," on ship and whaling outfits the Court applied the same doctrine, and held that a total loss of outfits could be recovered, there being a total loss of the ship.

In Kettell *v.* Alliance Ins. Co., 10 Gray, 144, the words used were, "Against partial loss."

This was a case of tin plates where the cargo was abandoned near the port of damage. Here a distinction is drawn between tin plates and the usual memorandum articles such as are perishable in their own nature.

The valuation in the case at bar is entire, and that must govern.

In Pierce *v.* Columbian Ins. Co., 14 Allen, 320, the words used are "Free of particular average," stated to be the same as "Against total loss only."

Gray, J., says, "And by the American law, if goods other than memorandum articles are injured by the perils of the sea to more than half their value, it is a constructive total loss, and authorizes an immediate abandonment and recovery against the insurers."

The learned circuit judge in the case at bar does not follow the reasoning of Judge Shaw in the case of Kettell *v.* Alliance Ins. Co. (*supra,*) (Record p. 106), and this is owing to the fact that he does not apply the term "memorandum articles" in the way that the term is commonly used and as used by Judge Shaw in that case.

The terms "memorandum articles" and "common memorandum articles" have a well-known meaning in the law of marine insurance, as being "articles which are perishable in their own nature."

It was first introduced in Lloyd's policies in England in 1749.

The form of the "common memorandum" is found in all the old text-books on marine insurance.

The stipulation in use in this country is generally called "common memorandum," and the articles enumerated in it are called "memorandum articles."

2 Arnould on Insurance, Perkins' Ed., 852, 856.

It was with the knowledge of the history, and the commonly understood use of the term, that Judge Shaw spoke of "memorandum articles."

The learned circuit judge, on page 106 of the Record, says: —

"He undertook to make a distinction between the articles found in the memorandum clause proper, and articles found in a rider."

This is not a correct statement, as an examination of the case shows that the word on which the defendant relied *was not in a rider*, but was in the body of the policy.

That the learned chief justice was speaking with a full knowledge of the subject appears by his own language in that opinion, which is as follows: —

On page 152: "One reason given why a constructive total loss should not be made up of damage on memorandum articles, so as to allow of an abandonment for damage, was that in the case of mere damage it was so difficult to distinguish between that part of visible damage which proceeds from internal tendency to decay, and that part from perils of the sea, that it must have been the intention of the contracting parties to exclude it altogether. In this respect there is a marked difference between tin and brass goods liable to tarnish, and memorandum articles liable to decay.

On page 154: "We have not thought it necessary to review the English cases on this subject, many of which were cited in the argument, for the reason already given, that they all related to memorandum articles, and not, like this, to a specific exception of goods liable to particular damage, but not perishable in their nature, and not embraced in the common memorandum."

On page 155: "There is no adjudged case which holds that when such goods, liable to particular damage, but not to decay or destruction by sea water, are shipped and insured, with an exception of liability for the partial loss, and the goods are damaged to more than half their value by a sea peril, the goods left at an intermediate port, so that by the established rule of law here the assured has a right to abandon, and he does seasonably abandon, this is not a legal total loss, for which he may recover."

The same line of reasoning is given in the case of Mayo *v.* India Mutual Ins. Co., 152 Mass. 172, and Judge Gray (now of the Supreme Court of the United States) uses the words "memorandum articles" in the same way in Pierce *v.* Columbian Ins. Co., 14 Allen, 320.

The reason for such a distinction is clear; the common memorandum articles are those which are perishable in their own nature, or are such that in case of being in contact with water, or in case of delay, will deteriorate very fast, so that it is difficult to determine whether the loss has been occasioned by sea peril, by the nature of the article, or the delay of forwarding it.

The Circuit Court and the Circuit Court of Appeals for the First Circuit both find that, in the State Court of Massachusetts, the plaintiff could recover, but state that the Supreme Court of the United States has examined the question, arrived at a contrary conclusion, and that it is therefore bound by the decisions of this Court.

In support of this statement it cites four cases:—

Marcadier *v.* Chesapeake Ins. Co., 8 Cranch. 39.
Morean *v.* U. S. Ins. Co., 1 Wheaton, 219.
Hugg *v.* Augusta Ins. Co., 7 Howard, 597.
Insurance Co. *v.* Fogarty, 19 Wallace, 640.

It is our contention that such is not the fact, as an examination of the cases will show.

Marcadier *v.* Chesapeake Insurance Co. (*supra*).

In this case, decided in 1814, where there was an attempt to recover a constructive total loss on the whole cargo, composed partly of goods that were perishable in their own nature, and written free of average, it was held that if the loss on the goods not covered by the above clause did not amount to a constructive total loss, at *the port of refuge*, that the loss on the memorandum articles, by reason of deterioration, could not be added in order to make a constructive total loss on the whole cargo.

The Court used the following language in its decision :—

"The underwriter is, in all cases of deterioration, entitled to an exemption from partial losses on the memorandum articles ; and in order to effectuate this right, it is necessary, where a technical total loss is sought to be maintained upon the mere ground of deterioration of the cargo, at an intermediate port to a moiety of its value, to exclude from that estimate all deterioration of the memorandum articles."

"In this way, full effect is given to the contract of the parties. *The underwriter is never made responsible for partial losses on memorandum articles, however great; and the technical total losses, for which alone he can be liable, are such as stand unaffected by the perishable nature of the commodity which he insures.*"

"Admitting, therefore, the rule to be correct, that the party had a right to abandon where the depreciation exceeds a moiety of the value, the plaintiff has not brought himself within that rule, as applied to a cargo of a mixed character like the present." (*Supra.*)

The case of Morean *v.* United States Insurance Company was an insurance on a cargo of corn, an article perishable in its own nature, and a common memorandum article. The vessel experienced heavy weather on a voyage from Baltimore to Lisbon. On December 19 the vessel was driven ashore at Lisbon. The cargo was wet, and was taken out and carried to Lisbon in lighters, and landed at Lisbon on the 22d of December, the cargo bringing less than half its invoice value. On March 11, 1813, the plaintiff offered an abandonment, which was refused by the insurance company.

In that case the Court says :—

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be a total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss."

"If the question turn upon the totality of the loss, unconnected with the subject of loss by deterioration of the cargo in value, or reduction in quantity, there is no differ-

ence between memorandum and other articles. If the loss be total in reality, or is such as the insured is permitted to treat as such, he is entitled to abandon and recover as for a total loss in the case of memorandum articles, but always with this exception, that he is not permitted to turn a partial into a total loss."

The two cases of Marcadier *v.* Chesapeake Ins. Co., 8 Cranch. 39, decided in 1814, and Morean *v.* U. S. Ins. Co., 1 Wheaton, 219 (1816), we contend, do not apply to the case at bar for other reasons.

The dicta in these cases are clearly founded upon what the Court considered to be the English dictum as stated in Cocking *v.* Fraser, (*supra*), and which doctrine has since been refuted by the English courts. For a discussion and history of this matter see 2 Parsons, Marine Insurance, 102.

These two decisions, however, are at most mere dicta. The abandonment in both cases was made too late, inasmuch as the insured property was not in peril, but had arrived at the port of destination when the abandonment was made.

So that even under the later decisions of the Supreme Court of Massachusetts the plaintiff could not have recovered.

Forbes *v.* Manf. Ins. Co., 1 Gray, 371.

The case of Hugg *v.* Augusta Ins. Co. (*supra*) was a case of insurance on the freight of a bark loaded with hides and jerked beef. The vessel received injury and was saved by salvors.

The freight policy contained a clause which made jerked beef "*free of average.*"

It was there held that there could be a recovery for a total loss of freight if the goods on the vessel were lost by any of the perils insured against.

In that case it is expressly stated that it is not the intention of the Court to pass on the question as to the respective rights of the owner of the cargo and its insurer.

The Court uses this language, viz.:—

"That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been re-shipped before it could have arrived at Matanzas, the port of destination."

The case of Great Western Ins. Co. *v.* Fogarty (*supra*) was insurance on a sugar packing machine "free from particular average," where parts of the machinery were lost, but more than one-half in amount but less than one-half in value was saved. "That which was saved was much broken and rusted, so that it would cost more to repair it, polish it, and put it in order for use than to buy a new machine."

In that case there was a loss of more than fifty per cent of the value of the property prior to the arrival at the port of destination; but no abandonment was made until after the cargo was landed. The Court held that the plaintiff could not recover for a total loss, as the goods were not in peril when the abandonment was made. The application of the same rule to the two cases cited from the Supreme Court of the United States would cause the decisions to be the same as were rendered.

It is stated in Phillips on Insurance (5th ed. Vol. II, p. 316, § 614) that where in a policy goods are insured "free from average," according to all analogy and to be consistent the rule as to constructive total loss should be the same as though the words were not used.

It is true that in the same work the law has been stated to be otherwise; but the book was published prior to the Massachusetts decisions above cited, and relies wholly upon the two cases, Marcadier *v.* Chesapeake Ins. Co. and Morean *v.* U. S. Ins. Co.

In Marcadier *v.* The Chesapeake Ins. Co. (*supra*) the Court uses the following language, viz.:—

"It seems now clear that a technical total loss may arise from the mere deterioration of the cargo by any of the perils insured against, if the deterioration be ascertained at an intermediate port of necessity, short of the port of destination. In such a case, although the ship be in a capacity to perform a voyage, yet if the voyage be not worth pursuing, or the thing insured be so damaged or spoiled as to be of little or no value, the insured has a right to abandon the projected adventure, and throw upon the underwriter the unprofitable and disastrous subject of insurance. *It has, therefore, been held that if a cargo be damaged in the course of the voyage, and it appear that what has been saved is less in value than the amount of the freight, it is a clear case of total loss.*"

In that case the Court gives its reasons *why common memorandum articles perishable in their own nature should be subject to a different rule.*

In this case the Court states that no rule seems to be established as to what constitutes a constructive total loss of goods, but recognizes the American rule as laid down by Chief-Justice Parsons in Massachusetts.

The doctrine of constructive total loss as applied to either cargo or ship had not been at that time fully developed in this country, as a careful reading of the above cases will show.

It is clear, therefore, that the cases in the Supreme Court of Massachusetts and in the Supreme Court of the United States are not in conflict, and that the rule established by both of these courts can be thus briefly stated: —

That if the goods are insured "free of particular average," "free of partial loss," "against total loss only," or "warranted free from average unless general," there can be a recovery for a constructive total loss, provided there is a seasonable abandonment and a loss by perils insured against amounting to more than fifty per cent of the valuation of the goods insured.

That in case no abandonment is made until after the goods have arrived at the port of destination, the abandon-

ment is not seasonably made, and the plaintiff cannot recover.

That in case of common memorandum articles perishable in their own nature, there can be no recovery for deterioration of the articles at a port of call or by mere delay in the voyage, is all that the cases in the Supreme Court of the United States decide, and the Court in the decisions by express language clearly distinguishes between articles perishable in their own nature and articles not so perishable.

The cases in the Supreme Court of the United States were before Judge Shaw when he made his decision in the case of Kettell *v.* Alliance Ins. Co. (*supra*) as the report will show.

In the case at bar the articles are not memorandum articles and the loss was caused by perils of the sea, the abandonment was duly made at the time the goods were in peril, and the plaintiff should be entitled to recover for a constructive total loss which the jury found it had suffered.

The circuit judge states (Record, p. 107): —

"The rule is an exceptional one, and against the general principles of underwriting. Nevertheless, there are these decisions of the Supreme Court which never have been modified by that Court as far as I can find."

No reason exists why a different rule should be applied where some of the goods arrive at the port of destination *in specie* than where they are landed in safety at any port.

If the rule is that an insurance company can under a policy on goods "free from partial loss" or "against particular average only" exempt itself from liability by having a part of the goods brought forward to the port of destination; such a contract would oftentimes cease to be a contract of indemnity.

II

That it was a question of fact for the jury as to whether on all the evidence the defendant company had not accepted the abandonment.

It is true that the agent of the defendant company, on May 1, 1893, wrote a letter in which he declined to accept the abandonment.

Exhibit 6, Record, p. 89.

He uses, however, these words in addition, "I await protest for particulars, after receipt of which can judge better regarding the loss."

Which clause shows that he desired to have the matter remain open.

An abandonment is to be governed by the facts existing at the time it is made.

This doctrine has often been stated by the Supreme Court of the United States.

Orient Ins. Co. *v.* Adams, 123 U. S. 67:

"That the abandonment of a vessel for a total loss, made in good faith at a time when it was in reasonable probability impracticable to recover and repair it, and when the damage by peril insured against amounted in all probability to fifty per cent, is a valid abandonment"; although it afterwards proved that the cost of repairs, etc., was less than fifty per cent.

But although an abandonment may be refused by the underwriter, it may be afterwards accepted by him, although the acceptance is taken wholly from acts which may be done from which the jury may imply acceptance.

In the case at bar the acts done by the defendant company are sufficient to warrant the jury in finding that there was an acceptance of the abandonment.

In Peels *v.* Merchants Ins. Co., 3 Mason, 27-85, Mr. Justice Story discusses what are acts of ownership which will amount to an acceptance of an abandonment.

In Phœnix Ins. Co. *v.* Copelin, 9 Wall. 461, which was a case in point, the Court uses the following language: "It is well settled, however, that an offered abandonment may be accepted, even when the assured has no right to abandon, and, if accepted, it must be with its consequences, and an acceptance need not be expressly made. It may even be refused, and yet the insurers by their conduct may make themselves liable for a total loss."

The question whether all the acts amount to an acceptance of the abandonment, is a question of fact for the jury.

See Richelieu & C. Nav. Co. *v.* Boston Marine Ins. Co., 136 U. S. 408.

The same doctrine is stated in

Northwestern Trans. Co. *v.* Continental Ins. Co., 24 Fed. Rep. 171 (by Judge Brown now of this Court).

Here the insurance was against "total loss and general average."

The vessel was raised by the underwriters and tendered back to the owners. The abandonment was timely. Held, that on the facts there was an acceptance of the abandonment as a matter of law. Cited with approval in the former case.

In the case of Carr *v.* Security Ins. Co., 109 N. Y. 505, where the language was "against actual total loss only," the Court uses the following language:—

"The underwriters having elected to take possession of the vessel under the rescue clause, it is plain, we think, that they could neither sell the vessel voluntarily, nor permit it to be sold under judicial process, in satisfaction of a lien which they had created, without thereby making the loss to the plaintiff an 'actual total loss,' whatever may have been its original character. The sale under the decree in admiralty divested irrevocably the title of the plaintiff."

The facts in Munroe *v.* British Ins. Co., 5 N. S., Ap. 179-193, 52 Fed. Rep., 777, are entirely different.

In the case at bar the underwriters create a lien on the goods by sending them forward,—in fact, create a greater liability than the original charter,—and for this lien the property was sold under judicial process.

The cases on which the defendant relies are not in conflict with the doctrine of Mayo *v.* India Ins. Co., 152 Mass., 172, and the other cases there cited.

In the case of Munroe *v.* British Ins. Co. (*supra*), the words used are "against absolute total loss of vessel and animals only." But the words here differ greatly.

At Velasco this whole cargo sold for the sum of $10,000, so that the expense of saving the wire and bringing it to a port of sale, without counting the expense of discharging and selling the same, amounted to over $2,000 more than the cargo was worth as shown by the sale.

The plaintiff also produced as witnesses experts who heard all of the evidence in the case and who testified that this sum was much in excess of what the cargo was worth.

Parmalee, Record, p. 62, Int. 62.

And who testified that the cargo would be commercially worthless, as the wire would be destroyed for the purpose intended.

Parmalee, Record, p. 58.
Clements, Record, p. 66.
D'Ewart, Record, p. 64.

And they all testify that it would have cost more to recondition the wire than it would cost to make new barbed wire.

This is clear evidence not merely of a constructive total loss, but of an actual total loss.

In England, under the decisions, this would constitute a case of actual total loss, as the cost of saving the property alone amounted to more than the property was worth after it was saved.

In the case of Crossman *v.* B. A. Ass. Co., L. R. 13 Ap. Cas., 161, in the Privy Council of England, which was

a case where the property was sold by reason of perils insured against, the Court held that it constituted an actual total loss. The Court uses the following language, viz., p. 169 : —

"It was admitted that no formal notice of abandonment was given, and it is unnecessary, in the view which their Lordships take, to determine whether what took place between the owners and the underwriters substantially amounted to such notice. Their Lordships are of opinion that after the sale under the decree of the Court of Admiralty there was an actual total loss."

"To constitute a total loss within the meaning of the policy of marine insurance, it is not necessary that a ship should be actually annihilated or destroyed. It may, as in the case of capture and sale upon condemnation, remain in its original state and condition. It may be capable of being repaired if damaged. It may be actually repaired by the purchaser, or it may not even require repairs. If it is lost to the owner by an adverse valid and legal transfer of his right of property and possession to a purchaser by a sale under a decree of a court of competent jurisdiction in consequence of a peril insured against, it is as much a total loss as if it had been totally annihilated."

This case shows the extent to which the doctrine has been carried in England as to "An actual total loss."

III.

That there is sufficient evidence to warrant a jury in finding an actual total loss of cargo.

In the case at bar, the cost of saving the cargo and bringing it to Key West, a port of safety, amounted to the sum of $9,393.15, and there were further expenses in Key West, amounting to the sum of about $1,190, making the total expenses of saving the property over $10,500.

All of the witnesses called in the case testify that there was no market for the cargo at Key West.

Hanna, Record, p. 67.
Mareno, Record, p. 69.
Williams, Record, p. 71.

The cargo was shipped by the Schooner "Cactus," at an expense for freight of $1,498.50, and for demurrage at Key West of $175, which, without any allowance for demurrage at Velasco, Texas, amounts to the sum of $1,673.50, which was the charge necessary to bring the cargo to a port where it could be sold; and it is acknowledged by all parties that Velasco, Texas, was as good a place to sell a cargo of barbed wire as any place in the United States.

Rice, Record, p. 21.

In the case of Wallerstein *v.* Columbian Ins. Co., 44 N. Y. 240, where the cargo was insured "free of particular average only," and where the cost of saving the cargo amounted to more than its value after it was saved, the Court held that it was a case of actual total loss.

In the case of Bullard *v.* Roger Williams Ins. Co., 1 Curtis, 148, Judge Curtis says: —

"If you should find, from the evidence in the case, that the injuries suffered by this brig from perils were so great that they could not be repaired so as to make her a seaworthy vessel, except at an expense exceeding her value when repaired, then this was a case of actual total loss and no abandonment was necessary."

The same doctrine is laid down in the case of Insurance Co. *v.* Fogarty, 19 Wall. 640, where parts of machinery were lost. Briefly stated the doctrine is this: —

If the use of the property insured, for the purpose for which it is made, requires an expenditure greater than the property is worth after that expenditure, then it is the case of an actual total loss, and no abandonment is necessary.

In other words, as in England, if the value of the property is absorbed by perils insured against, and the

cost of preservation and saving of the same, as well as bringing it to the port of destination, is more than the value of the property when saved and at the port of destination, it is a case of an actual total loss, and no abandonment is necessary.

In the case at bar the value of the property at the port of destination did not amount to the sums thus paid. See also, to this point,

Kinsman *v.* China Mutual Ins. Co., 49 Fed. Rep. 876.

And this doctrine is founded on what a prudent, uninsured owner would do under the same circumstances.

We submit that there is also evidence that at least the wire damaged did not arrive *in specie* adapted for the purpose for which it was intended.

The same doctrine has been stated in another form in the case of Williams *v.* Kennebec Ins. Co., 31 Maine, 455.

The case of Hugg *v.* Augusta Insurance & Banking Company, 7 Howard, 595, was a policy of insurance on the freight of the bark "Margaret Hugg," and the doctrine there stated, except as to the cases previously cited, refers only to what would constitute a total loss of freight under a freight policy. This cannot have any application to the case at bar, because there might be a constructive total loss of cargo and still not be even a partial loss of freight the nature of the two interests being so different.

Again the sale in the latter case was a voluntary one, not made by the underwriters, but by the direct act of the consignee.

This doctrine was stated in the case of Stringer *v.* Eng. & S. Mar. Ins. Co., L. R., 4 Q. B. 671, by the Court, that a constructive total loss by legal process might be occasioned, either by acts of the assured, or by acts which arose from perils against which they insured.

In the case at bar, the underwriters not merely worked under the sue and labor clause, but after the property insured was in a place of safety, *and after the voyage was*

abandoned by the owners of the Schooner "Benjamin Hale" the underwriters without in anyway notifying the plaintiff, transshipped the cargo on another vessel under a different charter, and forwarded it to Velasco, Texas, creating burdens upon it which did not before exist. This was clearly an act of ownership exercised by them without notice, by which liens were created which they have never offered to assume or pay.

It was for the liens thus created that the property was sold under the process of a Court of Admiralty.

IV.

The contract in this case should be governed by the law of Massachusetts.

The contract in the case was made in Massachusetts, and should therefore be governed by the law of Massachusetts.

Pierce *v.* Columbian Ins. Co. (*supra*).
Equitable Ass. Co. *v.* Clements, 140 U. S. 226.

In the case of Swift *v.* Tyson, 16 Peters, 1, where the decision of the State Court was not followed, the cause of action being on a bill of exchange which was negotiable in its nature, Judge Story uses the following language:—

"Undoubtedly, the decision of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this Court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed."

In Jackson *v.* Eden, 12 Wheaton, 153, a case on the construction of a clause in a will, A. devised certain land to his sons in fee and then added to his will, "If either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor," etc.

Per curiam: "After such a settled course of decisions, and two of them in the highest court of law in the State, upon the very clause in the will now under consideration, deciding that Joseph Eden did not take an estate tail, a contrary decision by this Court would present a conflict between the State Courts and those of the United States productive of incalculable mischief.

"It has been urged, however, that this Court applies this principle (that of following the State Court decisions) only to State constructions of their own statutes. It is true that many of the cases in which this Court has deemed itself bound to conform to State decisions have arisen on the construction of statutes. But the same rule has been extended to other cases; and there can be no good reason assigned why it should not be, when it is applying settled rules of real property. This Court adopts the State decisions because they settle the law applicable to the case; and the reasons assigned for this course apply as well to rules of construction growing out of the common law as the statute law of the State when applied to the title of lands."

The case at bar is one of the construction of a written instrument made in Massachusetts, where at the time the same was made the rights of the parties under such a contract had been determined by the highest Court of the State, it must be assumed that the contracting parties, both doing business in that State, intended to be bound by the law as thus determined, the same as though it were a statutory declaration.

This doctrine has been considered by Professor Thayer in a late article dealing with this subject, where the following language is used: —

"But there is another ground for coming into the courts of the United States. A case may come there, as this one has, not because of any question arising under the Constitution or laws of the United States, but simply because the plaintiff and defendant are citizens of different States or countries. In such a case, the Court is administering the law of the State. In this sort of case, the general rule is, that since the Court is applying the law of the State, it will follow, in determining what that law is, and construing it, the decisions of the highest court."

"But there are various qualifications of these doctrines. The most conspicuous of them is the principle of Swift *v.* Tyson, 16 Pet. 1 (1842), in which the novel and much contested doctrine was laid down, that upon questions of what are called general commercial law, the courts of the United States did not undertake to follow the State Courts. This declaration was not required for the decision of that case, but it has been followed and is an established rule in the United States jurisprudence. Its soundness in point of principle is, perhaps, open to question; at any rate, it is undergoing much criticism at the present day."

J. B. Thayer, on the case of Gelpcke *v.* Dubuque, in 4 Harv. Law Rev. 311.

In the case at bar, under the rule of construction laid down by the highest courts both of Massachusetts and England, these questions should have been submitted to the jury to determine whether or not there was a constructive total loss.

The case was brought in the State Court, and if the Federal Court should give a different construction to this contract, then there would be a conflict of laws within the same jurisdiction.

Such a conflict is unnecessary, and does not now exist. The distinction between the decisions of the Massachusetts Supreme Court and those of the United States Supreme Court is clear, and has been drawn earlier in this brief. That such a distinction is recognized, we think a careful reading of the cases of Marcadier *v.* Chesapeake Ins. Co. (*supra*), and Morean *v.* U. S. Ins. Co. (*supra*), will show. *This distinction is expressly spoken of in all of the Massachusetts cases cited.*

The rules of law contended for by the plaintiff are those that apply to both vessel and cargo.

To have this policy of marine insurance construed as asked for by the defendant and as stated by the United States Circuit Court of Appeals would enable insurance companies to save a part of a cargo of general merchandise and escape a loss, as it is a well-known commercial fact

that a policy like the one at bar is the only kind of policy on this kind of goods that can be obtained.

The rule that, where the loss is merely by reason of the inherent nature of the article insured, there cannot be a recovery, has been fully established by the courts long since the decisions of this Court in Mercadier *v.* Chesapeake Co. (*supra*) and Morean *v.* U. S. Ins. Co. (*supra*).

But where the loss as in this instance is by reason of marine perils insured against there should be a recovery.

In the case at bar the cargo was a total loss in value when the vessel was ashore and filled with water.

The cost of saving the cargo was more than its value after it was saved.

THE PURPOSE OF THE SAVING AND FORWARDING OF THE CARGO TO THE PORT OF DESTINATION WAS NOT IN ORDER TO SAVE PROPERTY, BUT TO PREVENT THE PLAINTIFF FROM RECOVERING HIS INSURANCE.

If this is the rule of law that is to govern in every case of stranding, all that will be necessary for an insurance company to do will be to save some part of the cargo and send it forward, no matter at what cost.

This surely is not the intention of the clause "free from partial loss."

The decision is contrary to the rule of law laid down by the courts in Massachusetts and in England, the *only courts that have* passed on this question.

We submit that the exceptions of the plaintiff should be sustained.

EUGENE P. CARVER,
EDWARD E. BLODGETT,
of Counsel.

Supreme Court of the United States.

THE WASHBURN & MOEN MANUFACTURING COMPANY,
PLAINTIFF, PLAINTIFF IN ERROR,

v.

THE RELIANCE MARINE INSURANCE COMPANY,
DEFENDANT, DEFENDANT IN ERROR.

DEFENDANTS' BRIEF ON PETITION FOR CERTIORARI.

This was an action removed from the Superior Court of Massachusetts to the United States Circuit Court for that district, and brought to recover the amount of a policy of insurance on a cargo of wire shipped on the schooner "Benjamin Hale" from Boston to Velasco, Texas. The policy contained the usual memorandum clause, to wit:

"MEMORANDUM. It is also agreed that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, . . . are warranted by the assured free from average, unless general."

And also the following clause, stamped with a rubber stamp on the margin of the policy: "Free of particular average but liable for total loss of a part if amounting to five per cent."

The "Benjamin Hale" grounded on Bird Key, April 19, 1893, and in consequence the goods insured "though not wholly submerged" were injured to an amount exceeding fifty per cent of their value. The plaintiff made a seasonable and sufficient abandonment of the goods, which the defendant refused to accept. The "Benjamin Hale" was condemned and sold at Key West under a libel for salvage, and subsequently nearly all the goods were forwarded on the schooner "Cactus" to Velasco, where they were tendered to the plaintiff, who refused to receive them. At the time of tender, a very large part of the goods existed in specie, and a substantial part of them were practically uninjured. The goods were afterwards sold by order of court on the libel of the master of the "Cactus" for freight and charges. The plaintiff contended, —

I. That under the terms of the policy the defendant was liable for a constructive total loss of the goods insured, and

II. That the defendant and its agents so dealt with the goods after the damage was sustained that their action amounted to an acceptance of the plaintiff's abandonment.

The Circuit Court (Putnam J.) ruled: —

1. That under the terms of the policy the plaintiff could not recover for a constructive total loss, but only for an actual total loss of the goods insured, and that there was no actual loss, and

2. That there was no evidence of an acceptance by the defendant of the plaintiff's abandonment.

As there had been an absolute total loss of more than five per cent of the goods insured, a verdict for the value of the goods so lost was rendered for the plaintiff.

To the rulings above mentioned the plaintiff filed exceptions, which were heard by the Circuit Court of Appeals and overruled.

Washburn & Moen Mfg. Co. v. *Reliance Ins. Co.*, 82 F. R. 296.

The plaintiff now seeks, by writ of *certiorari*, to try the correctness of these two rulings before the Supreme Court of the United States.

I.

Was the defendant liable under the terms of the policy for a constructive total loss of the goods insured; that is to say, was it liable if, as in this case, a substantial portion of the goods reached the port of destination in specie and practically uninjured?

In an elaborate and considered opinion, put into the form of a charge to the jury, Putnam, J., held that the defendant was not liable. The charge contains a careful review of many of the authorities.

Record, page 137.

On appeal, the Circuit Court of Appeals recognized that the rule laid down by Judge Putnam rested upon an unbroken series of decisions made by the Supreme Court of the United States, and therefore somewhat briefly overruled the exceptions.

The plaintiff asks that a writ of *certiorari* may issue to review the correctness of these two concurring decisions, basing his request upon the ground that they are contrary to the decisions in England and in Massachusetts.

That the rule adopted in England differs from that adopted throughout the United States, we fully admit. The difference is recognized by all writers on marine insurance. For a fuller discussion of this point see page 15, *infra*.

That the rule regarding liability for a constructive total loss adopted in one or two cases in Massachusetts differs somewhat from that adopted in every other jurisdiction of the United States where the question has arisen, we admit. The difference is recognized in at least one text-book, and is fully discussed by Judge Putnam.

2 Parsons on Marine Insurance, 112, 117.
Record, page 139.

The Supreme Court of Massachusetts, however, has not passed upon the question presented by this case; but on the contrary has distinctly recognized that even in Massachusetts the question raised by this case is still open.

See Charge of Judge Putnam, Record, page 139, and page 14, *infra*, of this brief.

The rule adopted by the Circuit Court and by the Circuit Court of Appeals has been declared or recognized, —

By the Supreme Court of the United States, in a series of carefully considered decisions, beginning in 1814 and ending in 1873, since which last time no one has cared to question it;

By the Circuit Court of Massachusetts, speaking by Judge Story.

By the Supreme Court of Maine, speaking by Chief Justice Shepley.

By the Supreme Court of Louisiana, in two cases;

By the Court of Appeals, and other courts of New York, in a series of many cases, beginning in 1803 and ending in 1888.

By the Supreme Court of Pennsylvania in an early case never questioned since;

By the Supreme Court of Missouri.

Except in Massachusetts, the rule has never been questio judicially. The plaintiff asks the Supreme Court to overrule or regard all these cases in order to accommodate itself, not to decisions of the Supreme Court of Massachusetts (for that court expressly refused to decide the question raised in this case), bu what the plaintiff thinks, perhaps correctly, should be the log consequence of one or more of those decisions. If he should p vail, confusion would be introduced, and a well-established princ of marine insurance would be overthrown. It may reasonably hoped that the Supreme Court of Massachusetts, when the ques is again presented to it, will put itself into agreement with other courts of the United States. We submit that it is unreas able to ask the Federal courts and those of many states to put th selves into agreement with the dictum of the courts of one state.

We subjoin a detailed consideration of the terms of the policy, a review and discussion of the decided cases.

Under the terms of the policy, the defendant undertook no liabi for a constructive total loss of the goods insured, but only for actual total loss. In other words, the defendant was not liable substantial portion of the goods insured reached the port of desti tion in specie and practically uninjured. The defendant's liabi was limited by two clauses in the policy, —

First. The memorandum clause, of which the essential part re as follows: —

"MEMORANDUM. It is also agreed that . . . wire of all ki . . . are warranted by the assured free from average, unless genera and

Second. Upon the clause written on the margin of the poli "free of particular average, but liable for absolute total loss o part if amounting to five per cent."

Record, pages 109, 111.

The marginal clause and the memorandum are to be taken togeth they have the same meaning and are in no sense contradictory. B are qualified by the exception stated in the latter clause: "but li

for absolute total loss of a part if amounting to five per cent." Undoubtedly, a clause written in the margin of a policy controls the printed memorandum so far as the two differ; but on the point that is material in this case, the marginal clause does not differ from the memorandum but simply reinforces it. The words "free from particular average" in the margin are equivalent to "free from average unless general" in the memorandum, since average must be either general or particular; and the words are recited over again merely to indicate clearly that the words which follow, insuring against "absolute total loss of a part," are not intended otherwise to relax the provisions of the memorandum.

See *Chadsey* v. *Guion*, 97 N. Y. 333.
Brooke v. *Louisiana Insurance Co.*, 5 Mart. N. S. 530.
Insurance Co. v. *Fojarty*, 19 Wall. 640.

In the first-named case the letters "F. P. A." were not considered to take the goods insured out of the category of memorandum articles.

See also Judge's Charge, page 139.

So in this case the marginal note does not take the articles insured out of the category of memorandum articles, but merely qualifies the nature of the memorandum.

The exception to the provisions of the marginal clause does, however, plainly fix the meaning of that clause. "Free from particular average, but liable for an absolute total loss of a part if amounting to five per cent," plainly means *not liable except for an absolute total loss, but liable for absolute total loss of a part.* If there be any doubt, therefore, of the meaning of the words "free from average unless general," or "free from particular average," the qualifying exception to the clause written on the side of the policy establishes an *expressed* intention of the parties to make the underwriter liable only "for absolute total loss"—of a part, or the whole; but actual loss, not constructive, in either case. That the word "absolute" has the same legal meaning as *actual*, see

Monroe v. *British & Foreign Insurance Co.*, 52 F. R. 777.

The plaintiff seeks to draw a distinction between memorandum articles and articles not perishable in their nature, and hence he maintains that the wire injured in the case at bar was not a memorandum article.

Plaintiff's Brief, page 8.

We submit that there is but one definition of a memorandum article known to the law, viz., any article mentioned in the memorandum. If any article be named in the memorandum of a particular policy, it becomes, so far as that policy is concerned, a memorandum article. The memorandum itself distinguishes between different articles mentioned therein, and expressly applies to each article the rule which is adapted to its nature. There is no warrant in reason or in authority for applying a different rule to articles included with the consent of both parties under the same rule by the express language of the memorandum. In *Waln* v. *Thompson*, 9 S. & R. 115, 117, 119, an attempt was made to draw a distinction like that contended for by the plaintiff, but the Court disregarded the attempt.

It is the general rule of law that memorandum articles, or articles warranted free of particular average, free from average unless general, or however otherwise the meaning may be expressed, are insured only against an actual total loss. This rule is well established in the Supreme Court of the United States and in the courts of this Circuit.

In *Marcardier* v. *The Chesapeake Ins. Co.*, 8 Cranch, 39, a part of the goods insured were "memorandum articles," that is to say, they were warranted "free from average, unless general." (See contemporary form of memorandum in Marshall on Insurance, 1st Am. Ed., Boston, 1805, page 139 *et seq.* See also 8 Cranch, 42, 43.)

The plaintiff claimed damages for a constructive total loss of this part of the goods; but the Court refused to allow this. After stating the American rule applicable in the case of ordinary goods, viz., that a damage exceeding fifty per cent entitles the insured to recover for a total loss, Mr. Justice Story added: —

"But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the

memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed."

The learned counsel for the plaintiff is in error in the statement, made on page 12 of his brief, that the abandonment in this case was made too late. It is expressly stated that the abandonment was seasonable. See 8 Cranch, 41.

In the case of *Morean* v. *The United States Ins. Co.*, 1 Wheaton, 219, a part of the cargo consisted of "memorandum articles"; that is to say, goods warranted free from average, unless general. In delivering the opinion of the Court, Mr. Justice Washington said: —

"All considerations connected with the loss of the cargo, in respect to quantity or value, may, at once, be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception.

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the insured can demand as for a total loss, that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and, consequently, he cannot elect to turn it into a total loss."

The learned counsel for the plaintiff, in his brief (page 12), says that these two decisions are at most mere dicta. We submit that they are, on the contrary, carefully reasoned decisions upon the question raised by the case at bar.

In the case of *Hugg* v. *The Augusta Insurance Co.*, Taney, 159, 7 How. 595, the insurance was upon freight on articles warranted free from average, and the Court throughout treated the case as governed by the principles applicable to similar insurance upon a

cargo. In delivering the opinion of the Court, Mr. Justice Nelson said, "In this country the rule has been uniform that there must be a destruction of the article in specie, as will be seen by reference to the following authorities" (quoting among other cases *Brooke* v. *Louisana Insurance Co.*, *Morean* v. *United States Insurance Co.*). "The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriters against the strong temptation that may frequently exist on the part of the master and shipper to convert a partial into a total loss." (7 How. 605, 606.)

The learned counsel for the plaintiff, in his brief (page 12), says that this case decided that there could be a recovery for a total loss of freight if the goods on the vessel were lost. What the case decided was this: that the defendant was not liable for a total loss of freight unless it appeared that there was a destruction in specie of the entire cargo.

See the Order of the Court, 7 How. 611.

In the case of *Insurance Co.* v. *Fogarty*, 19 Wall. 640, the insurance was on machinery warranted in the memorandum clause "free from average unless general," and further warranted by the insurers "free from particular average." The plaintiff sought to recover for a total loss. It does not appear explicitly that the insured made a formal abandonment, but, as appears from the record in the case, page 18, the declaration stated that two days after the loss, "he (the plaintiff) produced and made to the said defendants due proof of loss and of his interest," and this act, the equivalent of an abandonment, seems to have been assumed or admitted at the trial. The Court, after an elaborate discussion of *Marcadier* v. *Chesapeake Insurance Co.*, *Morean* v. *Insurance Co.*, and some other cases, laid down the rule that in the case of a warranty like that just quoted, the plaintiff could not recover if any part of the machinery reached its place of destination still existing as machinery. The plaintiff was allowed to recover on the ground that the stuff which reached the port of destination was not machinery but merely old iron. It appeared that the value of the stuff saved was less than the cost of saving it (see the Record in the case,

pages 33, 35, 42), but this fact was not treated as a cause for recovery.

The statement of this case made by the learned counsel for the plaintiff in his brief (page 13) is somewhat inaccurate. About one half the weight of the machine was saved, but less than one fortieth of its value (See 7 Wall. 641), and the value of the part saved was less than the cost of saving it. The court did not hold, as stated by the learned counsel for the plaintiff, "that the plaintiff could not recover for a total loss, as the goods were not in peril when the abandonment was made." The Court said nothing whatsoever about the abandonment (indeed the word does not occur in the opinion, except casually in a quotation), probably because, as has been shown, *supra*, an abandonment had been made within two days of the loss, and while all the goods insured were under water. What the Supreme Court did in *Insurance Co.* v. *Fogarty* was to hold that the plaintiff could recover if the machinery injured had ceased to exist as machinery, and that the charge of the judge to that effect in the court below was correct.

In the case of *Robinson* v. *The Commonwealth Ins. Co.*, 3 Sumner, 220, the policy contained a clause freeing the insurers from liability "for any partial loss on goods esteemed perishable in their own nature." The goods insured were held to be perishable, and so the case stood as if the goods had been declared specifically to be free from particular average.

In addressing the jury, Mr. Justice Story said: —

"The principle of law is very clear, that, as this is an insurance on a perishable cargo, the plaintiff is not entitled to recover unless there has been a total loss of the cargo by some peril insured against. If the schooner had arrived at the port of destination with the cargo on board physically in existence, the plaintiff would not have been entitled to recover, however great the damage might have been by a peril insured against, even if it had been ninety-nine per cent, or in truth even if the cargo had there been of no real value."

In the case of *Monroe* v. *The British & Foreign Marine Ins.*, 52 F. R. 777, the insurance was on cattle, and the policy contained the following clause: "against absolute total loss of vessels and animals only."

It was argued that under the policy the defendant was liable for a constructive total loss, but the Court held otherwise. See page 788.

The principles above stated have been supported and established by the opinions of the best writers on insurance, and by many cases in the courts of the several States.

Phillips on Insurance, ed. 1867, Sections 1615, 1767.
2 Parsons on Insurance, ed. 1868, page 111.

In the case of *Brooks* v. *Louisiana Insurance Co.*, 5 Mart. N. S. 530, 535, it was said by the Court "that nothing short of an absolute destruction of the whole property insured would render the assurers responsible, and if any portion reached the port of destination, they were discharged from liability."

In *Skinner* v. *Western Insurance Co.*, 19 La. 273, the Court approved the statement of Mr. Phillips, that "from most of the cases, it seems that although they (the goods insured) are so damaged as to be rendered absolutely of no value, still, if they remain in specie, if they so subsist that they may still be properly designated by the same name, the underwriters are not liable for a total loss." In this case, the doctrine was carried to its extremest limit. The article insured was raw pork, and the remnant of pork which arrived at the port of destination reached it as "roasted or barbacued" pork; yet the Court held that the pork still existed in specie, and that there could be no recovery.

In *Williams* v. *Kennebec Insurance Co.*, 31 Maine, 455, 463, the insurance was on cargo and freight, not liable for partial loss, and the Court said, "If (a perishable) article or any part of it arrives at the port of destination in specie, or can, with reasonable care and diligence, be carried there in that condition, although it may be worthless there, there can be no total loss." See also Judge's Charge, page 139.

Willard v. *Manufacturers Insurance Co.*, 24 Mo. 561, 566;
Waln v. *Thompson*, 9 S. & R. 115, 120;

in both which cases the rule laid down by the Supreme Court of the United States was fully recognized.

In the courts of New York it was early decided that the in-

surers were not liable for a constructive total loss of memorandum articles.

See

Maggrath v. *Church*, 1 Caines, 196, 211.

Neilson v. *Columbian Ins. Co.*, 3 Caines, 108.

Wadsworth v. *Pacific Ins. Co.*, 4 Wendell, 33, 39 (*free from average unless general*).

DePeyster v. *Sun Ins. Co.*, 19 N. Y. 272 (*free from average unless general*).

The case of *Wallerstein* v. *The Ins. Co.*, 44 N. Y. 204, has sometimes been treated as establishing the contrary doctrine, but an examination of the case will show that it does nothing of the sort. Defendant insured the plaintiff on coffee valued at about $25,000, and on wool valued at about $4,000, *free of particular average only*. Ship was sunk and abandoned by the insured. Under instructions from the insurers, salvors succeeded in saving about $1,000 worth of the wool, and less than $3 worth of the coffee. Suit was brought for a total loss. It was admitted both in the court below and in the court above that no recovery could be had for the insurance on the wool, although damaged to the amount of nearly seventy-five per cent (see *Burt* v. *Brewers Ins. Co.*, 9 Hun. 383, 388); but a recovery was had for the coffee as for a total loss, the Court holding, apparently, that it had totally perished, and that the recovery of an insignificant amount, both in quantity and value, was merely illusory, amounting to a fraud on the part of the insurers. It is true that the opinion of the Court casts some doubt upon the doctrine laid down in the case of *Morean* v. *The Ins. Co.*, above cited, but later decisions make it plain that the Court of Appeals in New York fully accepts the doctrine of the case last cited.

In *Burt* v. *The Brewers' Ins. Co.*, 9 Hun. 383, the insurance was "against actual total loss only." This phrase was assumed throughout to mean the same thing as the memorandum clause, and the Court said (page 386): "The meaning of (the memorandum) is that there can be no partial loss, and that there must be an actual destruction of the article specified in the memorandum, and not merely such a technical total loss as would authorize an abandonment." The Court further said (page 388): —

"It is supposed by the appellant that the case of *Wallerstein* v. *The Ins. Co.* has laid down a different rule as regards memorandum articles from that which we have hereinbefore relied on as a settled rule of law on the subject. We do not so interpret that case. There the insurance was upon wool and coffee free from average unless general."

"The coffee became wholly lost to the owner, that is, its entire value became lost, though the coffee remained in specie. But no recovery was allowed for the wool, though its value had been $3,961 and sold after the damage at $1,100.02 in excess of the auctioneer's charges, and this balance was subject to a deduction of sixty per cent for salvage, leaving only $440, or about one ninth of the value. It is true, it is said in that case, that absolute physical destruction is not necessary to constitute a total loss, but only a destruction of the thing insured, as the thing it was when insured. The coffee, though the berry still existed, was no longer coffee in the mercantile sense of the word, and could not be restored by any amount of expenditure." This case throughout treats the memorandum clause as equivalent to "against actual total loss only."

In the same case on appeal, 78 N. Y. 400, the Court of Appeals sustained the decision of the Supreme Court and said, "The well-considered opinion of Talcott, J., at the General Term, renders it needless to add more."

In *Chadsey* v. *Guion*, 97 N. Y. 333, there was the usual memorandum warranty that the goods were "free from average unless general." The letters "F. P. A." (free from particular average) also were written in, yet the Court throughout treated the goods insured as still memorandum articles, and it cited *Morean* v. *The U. S. Ins. Co.*, with approval, and assumed that *Wallerstein* v. *The Ins. Co.* agrees with it. It is true that in *Chadsey* v. *Guion*, the Court said that by the memorandum clause it was the intention of the parties to confine their liability to the absolute or constructive loss of the entire cargo. Whatever the word "constructive" may mean as used here, if, indeed, it be not a mere slip of the pen, plainly it does not refer to a fifty per cent loss; for in *Chadsey* v. *Guion* there was a loss of over ninety per cent, and yet the Court would not allow the plaintiff to recover. And in another part of the

opinion it is said: "An underwriter is not accountable for a partial loss on memorandum articles, except for general average, unless there is a total loss of the particular species"; and again, any dealing with the property "by the assured which results in the preservation of a substantial part of it (cargo insured), so that it may be delivered in safety and in good order at the port of destination, discharges the obligation of the assurers." 97 N. Y. 338.

In *Merchants S. S. Co.* v. *Mutual Ins. Co.*, 19 Jones & Spencer, 444, 455, the insurance was on a vessel "free of particular average," and the Court said:

"The rest of the policy, and particularly the written clause 'free from particular average,' fixes what claim may be made. That under this claim (*sic*, for clause) a constructive total loss cannot be claimed is generally declared to be the law. This is founded upon reason. The rule as to technical or constructive total loss was made from a necessity there was, many times, of determining whether, when some part of the thing insured remained after a loss, it could be correctly held that there was actual total loss. If what was left was inconsiderable as to any of the uses or advantages of the subject when whole, it would only be literally true that the loss was not total, while really the owner would be more likely to abandon the remnant than try to save it.

"How large or great a quantity might be left and yet there be a total loss was determined, not by attempting to ascertain the value of the remnant directly, but by ascertaining what the loss was; namely, the cost of repair, after the reduction of new for old, and if the cost were more than one half of the value of the thing insured, then it was deemed that the remaining half, represented by the actual remnant, was not so considerable that its existence should prevent a legal conclusion that there was actual total loss. It was not denied that in such case the insurers paid for what was only a partial loss, indemnifying themselves by taking the remnant. In many cases there was no doubt that there was no total loss actually. If the parties contract against such a method of judgment, the law will carry out their intent. The clause against particular average or partial loss means that the insurer will not pay what is in fact a partial loss, under any circumstances, and therefore not for a construc-

tive total loss, for the latter is really a payment for a partial loss, and for a constructive value of the remnants. There is no such thing as a constructive partial loss."

Finally, in the case of *Carr* v. *The Security Ins. Co.*, 109 N. Y. 504, 509, the goods were insured "against actual total loss only"; and the Court said that "the cases in this State, in respect to memorandum articles, where the insurer is liable only for an actual total loss, in the main, sustain the view that total loss in value of memorandum articles, so long as they remain in specie, is not an actual total loss of such articles within a policy of marine insurance."

It will be perceived that the last case goes much further than we need go in arguing the case at bar; and it brings the law of New York into full accord with that laid down by the Supreme Court of the United States in the case of *Morean* v. *The U. S. Ins. Co.*

In these cases the Court gave the same meaning to the various phrases "free of particular average," "free from average unless general," "liable only for actual total loss," etc.

The plaintiff relies upon certain cases decided in the Supreme Court of Massachusetts. In *Kettell* v. *Alliance Insurance Co.*, 10 Gray, 144, it was decided that under the following clause: "partial loss on sheet iron, iron wire, braziers' rods, iron hoops and tin plates, is excepted," the insurers were liable for a constructive total loss under the fifty per cent rule. In the opinion it was admitted that the insurers would not have been liable for a constructive total loss of memorandum articles, and the case was decided upon the ground, which was presented with some elaboration, that the goods insured differed in nature from memorandum articles. From the opinion it is perfectly clear that the Court which decided the case would have decided the case at bar in favor of the defendant, inasmuch as in the case at bar the articles insured were memorandum articles. See the discussion of this case in the opinion of Judge Putnam.

Record, page 139.

The case of *Mayo* v. *India Insurance Co.*, 152 Mass. 172, followed the case just quoted, and accepted it as an authority. In that case the Court expressly refused to decide whether under the ordi-

nary memorandum clause an insurer is liable for a constructive total loss. "Whether in this Commonwealth there can be no total loss of a memorandum article, if any part of it arrives at the port of discharge in specie . . . we express no opinion." 152 Mass. 175, 176. We believe that this is the only case in the courts of the United States in which it has even been intimated that the insurer may possibly be liable for a fifty per cent constructive total loss of memorandum articles. There are many cases holding precisely the contrary, while this case simply refuses to pass upon the point.

See the criticism on this case in

2 Parsons on Marine Insurance, 112, 117.

It is to be observed that the editor's note in Parsons was written by Mr. Lathrop, now justice of the Supreme Court of Massachusetts.

In order to decide the case at bar in favor of the plaintiff, the Circuit Court and the Circuit Court of Appeals must have disregarded decisions made in many cases, and the rule adopted in many jurisdictions of the United States. To decide the case at bar in favor of the defendant, those courts were not required to disregard a single decided case or a rule adopted in any jurisdiction. They needed only to refuse to draw from the last of the Massachusetts cases a corollary which the Massachusetts court in its own opinion expressly refused to draw.

See remarks of Judge Putnam, Record, page 139.

We need not refer at length to the English cases. No doubt, at the present time it is the law in England that for a constructive total loss of memorandum articles the plaintiff may recover, but it is also the law that the plaintiff cannot recover for a constructive total loss of any articles — memorandum or other — unless they are injured practically to the amount of one hundred per cent; that is to say, unless they are so injured as to be of no substantial value when brought to the port of destination. Thus the English rule is in effect nearly as rigorous as the American in respect of memorandum articles, while it is very much more rigorous in respect of articles not included in the memorandum. Further comment on the English cases is unnecessary.

See 2 Chitty Pl., 16th Am. ed., 163, note c.
2 Arnould on Insurance, 6th ed., 952, 1005, 1014.

In the case at bar a large part of the goods insured reached Velasco in specie, a substantial part of them being practically uninjured.

Deposition of Cragin, pages 28, 34.
Deposition of Cortes, page 71.
Deposition of Blum, page 105.

These depositions state the case most strongly for the plaintiff. Cragin was the plaintiff's agent, and Blum, though called by the defendant, proved a hostile witness. Yet the statements of both make it abundantly clear that in the case at bar the injury to the goods insured was less than that sustained in the case of *Morean* v. *U. S. Ins. Co.*, and in the other cases cited above, where the Supreme Court of the United States did not allow the plaintiff to recover. It is entirely clear that there was no "absolute total loss" of the property insured and that the Court could not have permitted the jury to pass upon the question. Defendant contends, therefore, that the Court was right in ruling that under the terms of the policy, and the circumstances of the case, the defendant was liable only for an absolute total loss of a part of the goods insured. (See Plaintiffs' Petition, page 9). For that loss the plaintiff has been already reimbursed.

II.

Was there evidence of the acceptance by the defendant of the abandonment made by the plaintiff?

This is a mixed question of law and fact, and a question of fact much more than of law. The judge of the Circuit Court had the advantage of hearing the testimony of some of the witnesses, and he carefully considered the depositions of the others. It was proved that the defendant expressly refused to accept the abandonment made by the plaintiff, and the learned judge could find no evidence strong enough to control this express refusal. The Circuit Court of Appeals

reconsidered the same testimony, and, while agreeing with the result reached by the Circuit Court, took a view of the testimony distinctly more favorable to the defendant than that taken by Judge Putnam. No important question of the law of insurance is involved in this branch of the case, and we submit that there is no good reason why the Supreme Court should reconsider a question of fact which has been carefully considered and unanimously decided by two competent tribunals.

For the purpose of reference, we subjoin an argument upon this branch of the case, taken, for the most part, from our brief addressed to the Circuit Court of Appeals.

Admitting, for the sake of argument, that the defendant was not originally liable for a constructive total loss, yet the plaintiff contends that such liability now exists by reason of the defendant's acceptance of the plaintiff's offered abandonment.

Was there, then, evidence of an acceptance by the defendant of the abandonment of the goods insured made to it by the plaintiff? It must be constantly borne in mind that the defendant refused to accept the plaintiff's abandonment in the most unqualified manner. The defendant's conduct must be considered in the light of its refusal. In spite of this refusal the plaintiff now contends that the defendant's acts subsequent to the refusal amounted to a retraction of it and the substitution for it of an acceptance.

The matter must be considered in two aspects. In his charge (see page 142), Judge Putnam said (1) that he thought the forwarding of the goods from Key West to Velasco was made by the defendant; but (2) he ruled that such forwarding, under the circumstances, was not evidence of an acceptance of the plaintiff's abandonment.

1. The Circuit Court of Appeals did "not entertain the view of the Circuit Court that the underwriters chartered the "Cactus" and forwarded by her the cargo from Key West to Velasco." "The sounder opinion" was by the Circuit Court of Appeals thought to be that those acts were done under the authority of the captain of the "Benjamin Hale". We submit that the Circuit Court of Appeals was right.

The facts were as follows: —

The charter party of the "Cactus" was made, not with the defendant, but with the master of the "Benjamin Hale," and was signed by him (Record, page 120). He authorized Messrs. Taylor & Curry, his agents at Key West, to charter the "Cactus," and they paid for the discharge of the cargo at Key West (Record, page 23). The bills for wharfage, etc., at Key West were made out to the owners and underwriters of the "Benjamin Hale," and not to the defendant or to the underwriters of the cargo (Record, page 122). The second bill of lading was signed by Mr. Taylor, of the firm of Taylor & Curry, agents for the "Benjamin Hale," and not for the defendants, as Capt. Hall testified. (See Record, page 23, 82 F. R. 296.) The goods are stated to be shipped by Capt. Hall, evidently with the intention of forwarding them to the plaintiff, to whom they were to be delivered (Record, page 125). The only evidence to connect the defendant with the forwarding is found in Capt. Hall's testimony, page 22, where he says that he received a request from the defendant's agent to forward the wire to Velasco. (His statement on page 23 that Mr. Moreno, the defendant's agent, did not wish him to take the cargo to Tortugas, but to go on to Key West, obviously has no connection with the forwarding to Velasco). Capt. Hanna, the defendant's agent, testified that he instructed Mr. Moreno, the underwriter's agent at Key West, to see that a vessel was secured and the cargo properly shipped to Velasco, according to the original bill of lading; that he always insisted on Capt. Hall's forwarding the cargo. (Record, page 86). Taking all this evidence together, it shows, not that the defendant forwarded the cargo to Velasco, but that the defendant was very careful not to do so, and that the forwarding, though perhaps made by its advice, and even at its instance, was the act of the master of the "Benjamin Hale."

That it was the duty as well as the right of the captain of the "Benjamin Hale" to forward the cargo seems clear.

2 Parsons on Insurance, page 155.

2 Phillips on Insurance, Sect. 1624.

Abbott on Shipping, 13th. ed., 411, 414.

Cannon v. *Meaburn*, 1 Bing. 243.

Shipton v. *Thornton*, 9 A. & E. 314.

Even if the transhipment were irregularly made or unauthorized, still it would not thereby become the act of the defendant. Let us suppose that A, a vendor, has shipped goods to B, a vendee, and that B, on examining the goods, promptly notifies A that they are not satisfactory. A controversy arises between A and B, and it is shown that B, while consistently and repeatedly denying ownership in the goods, yet has in good faith, and under a mistake of law, advised the common carrier to do acts which amount to a conversion of them. We have purposely stated the facts as strongly as possible against B, but we think it would be impossible to maintain that B's advice to the carrier, however urgent, operated as an acceptance by him of the goods.

We contend, therefore, that the Circuit Court of Appeals was right in holding that the forwarding to Velasco of the goods insured, though doubtless advised and urged by the defendant, was not its act, but the act of Capt. Hall. If this is true, the forwarding cannot, of course, be evidence of the acceptance by the defendant of the plaintiff's abandonment.

2. Supposing, however, as contended by the plaintiff, and according to the opinion of Judge Putnam, that the defendant itself did forward the goods to Velasco, was that act an acceptance of the plaintiff's abandonment?

We contend that both Judge Putnam and the Circuit Court of Appeals were right in holding that under the circumstances of the case, the forwarding of the goods, even if such forwarding be held to be the act of the defendant, was not an acceptance by the defendant of the plaintiff's abandonment.

In discussing this question it is necessary briefly to consider the occasion of an abandonment, when it is necessary, and when and how it must be accepted. According to the law of insurance, goods insured, even though they be not actually destroyed, yet may be so greatly injured that the insured becomes entitled to treat his loss as constructively total. In such case, the insured, however, is not compelled to claim for a total loss; he may, at his option, treat the loss as partial or as total, but if he seeks to recover the total value of the goods, he must abandon them to the insurer within a reasonable time, and not keep the insurer in doubt concerning his intention.

This abandonment must be timely; the insured must not speculate on the result of the peril insured against, nor can he wait to determine if a claim for a partial or for a total loss would be to his greater advantage. On the other hand, the insurer, in a case of doubt, is not permitted to speculate upon the event any more than the insured. He must not wait to determine if it will be to his greater advantage to accept the abandonment or refuse it. The obligation to abandon, and to accept or refuse an abandonment when made, is to some extent reciprocal. (See *Smith* v. *Robinson*, Dow, 474, 479; *Hudson* v. *Harrison*, 3 B. & B. 97.) Probably it is true, as stated by Mr. Justice Story in *Peele* v. *Merchants Insurance Co.*, 3 Mas. 27, 81, that the insurer is not bound to state explicitly whether he accepts the plaintiff's abandonment or not, and that mere silence is to be construed as a refusal; but, if the insurer remains silent and makes no reply to the abandonment made by the insured, his position thereby becomes so ambiguous that a court will often look to his acts to construe his unspoken intention, and will sometimes construe such acts as an acceptance of the abandonment. Thus, in *Hudson* v. *Harrison*, 3 B. & B. 97, where the insured, after abandonment, called a meeting of the underwriters and later notified them that the cargo was to be sold, to which notification the defendant paid no attention, while some of his fellow underwriters were approving the acts of the insured in dealing with the property, the Court said: "The question is, therefore, whether the underwriters by lying by in the present instance have not induced the assured to believe that the abondonment was acquiesced in."

So, also, in *Provincial Insurance Co.* v. *Leduc*, L. R. 6 P. C. 224, where the insured abandoned to the insurer the wreck of the vessel insured, to which abandonment the insurer made no reply but took possession of the wreck, raised it, and afterwards allowed it to be sold, the Court held that, under the circumstances, the insurer must be held to have accepted the abandoment.

The case of *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, illustrates the principle just stated. The vessel insured was lost by a peril not insured against; but at the time of the abandonment, which was promptly made, this fact was unknown to

the insurer, and very possibly also to the insured. The insurer thereupon took possession of the vessel and repaired it, but, having thereafter discovered that the loss was caused by a peril not insured against, allowed it to be sold on a libel for repairs. The insured thereupon contended that these facts amounted to an acceptance of the abandonment, and requested the Court to charge the jury that the facts stated were evidence of the acceptance of the abandonment by the defendant. This the Court refused to do, though it seems that it left the question of the acceptance of the abondonment to the jury under some instructions not stated. The Supreme Court of the United States sustained the ruling of the Court below, and held that the facts stated were not evidence of an abandonment.

The same disaster was also considered by the Supreme Court of Michigan in *Northwestern Transportation Co.* v. *Insurance Co.*, 59 Mich. 214; *Richelieu Navigation Co.* v. *Insurance Co.*, 72 Mich. 571. In this case the additional fact was found that the insurer, having taken possession of the vessel, had never offered to return it to the insured. The Court, therefore, in the absence of any explicit statement by the insurer, held that the abandonment had been accepted, on the ground that such was the reasonable construction to put upon the insurer's act, and the judge delivering the opinion said, "I think the jury would have the right to construe the act most strongly against the defendant, for the reason that its interest was a matter entirely within its own knowledge, and by speaking it had the power to solve all doubts and dispel all ambiguities, and although no duty rested upon it to say whether it accepted the abandonment or not, so long as it was both silent and inactive, yet, when it did act, its duty was to say for what purpose, and with what intent it proposed to act." 59 Mich. 234.

See to the same effect,

Cinn. Insurance Co. v. *Bakewell*, 4 B. Mon. 541.
Singleton v. *The Phenix Insurance Co.*, 132 N. Y. 298.
Peele v. *Merchants' Insurance Co.*, 3 Mas. 27, 83.

These cases establish that where the insured makes seasonable abandonment to the insurer, who makes no reply thereto, but leaves the insured in doubt concerning his intentions, then the acts of the

insurer may in some cases be treated as an implicit acceptance of the abandonment.

This principle, however, has no application to the case at bar. Here the defendant declined to accept the abandonment as soon as the letter offering it was received (Record, pages 111, 115), and from that time forward persistently and unqualifiedly denied its liability and contested the claim of the insured for a total loss. There never was any ambiguity whatever in the attitude of the defendant.

See Judge's Charge, Record, 140, 141.

Acts of the insurer are construed as an acceptance of an abandonment, when a reasonable man would suppose that an acceptance was implied or intended by them. In the case at bar it would never have entered into the mind of a reasonable man, and it never did enter into the mind of the plaintiff, to suppose that the defendant had the slightest intention of accepting the plaintiff's abandonment. Suppose it had turned out to be for the plaintiff's interest to accept the goods when tendered to it at Velasco by the captain of the "Cactus"; it is clear that the defendant could not possibly have contested the plaintiff's right to them.

The case of *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, 433, seems to treat it as an open question if an offered abandonment can be accepted when the assured has no right to abandon; or if such acts as taking possession of the property insured "after a perem ptory abandonment, *without qualification or reservation*, are such acts as imply and constitute an acceptance of the abandonment." However this may be, it can hardly be contended that even such acts can turn the most explicit refusal of an abandonment into its acceptance.

In the case at bar not only did the defendant immediately refuse to accept the abandonment when first offered, but it did so again as soon as the second offer of abandonment was made by the plaintiff at Velasco. It would be more reasonable to contend that the plaintiff's second abandonment at Velasco was a recognition of the invalidity of its first offer to abandon, than to contend that the defendant's repeated refusals to accept an abandonment were equivalent to an acceptance, and its insistence that the property in the goods still remained in the

plaintiff was the equivalent of an assertion that the goods belonged to the defendant.

See Record, pages 115, 127.

Shepherd v. *Henderson*, 7 App. Cas. 49, 62.

It must always be borne in mind that there is a principle of the law of insurance at least as important as that which concerns the acceptance of an abandonment — a principle which should receive its full application in this case. The interest of the community requires that both insured and insurer should labor with their utmost energy for the preservation of the goods insured. Under the old form of policy some courts tended to hold that a taking possession of or a dealing with the goods insured by the insurer after an abandonment amounted to an acceptance of the abandonment.

See *Peele* v. *Merchant's Insurance Co.*, 3 Mas. 27, 85.

In consequence of this tendency, property insured was sometimes allowed to perish because neither insured nor insurer dared to meddle with it; the one, for fear that he should be deemed to have revoked his abandonment; the other, for fear that he should be deemed to have accepted it. The "sue and labor" clause in some form was therefore inserted in the policy to enable both parties to labor for the preservation of the goods without affecting their rights, and this clause, whether regarded as a new stipulation or merely as a statement of the true principle of the common law of insurance, should in the interest of the community receive a generous application. The policy provides not only that the assured may sue, labor and travel for the safety of the goods, etc., but also contains an explicit stipulation that the acts of the insurer in recovering, saving and preserving the property shall not be considered an acceptance of an abandonment. The object of this stipulation, of course, is to provide that acts, otherwise unlawful, or which otherwise might be construed as an acceptance of an abandonment, shall, by virtue of the stipulation, become lawful and without prejudice to the rights of the insurer.

See

Judge's Charge, Record, page 140.

Munroe v. *The British and Foreign Insurance Co.*, 52 F. R. 777, 788.

In *Schuyler* v. *The Phœnix Insurance Co.*, 56 Hun. 493, the cargo was injured by perils insured against. The "sue and labor" clause in the policy was essentially the same as that in the case at bar. The insurer removed the cargo from the damaged vessel, delivered the uninjured part to the plaintiff, and sold the rest, paying the plaintiff the net proceeds. It was held as a conclusion of law that there was no such dealing with the cargo as to make it a total loss; yet in that case the evidence of abandonment was much stronger than in the case at bar, for the insurer did not merely deliver some of the goods at their destination, but also sold some of them without authority from the insured, in order to prevent further damage.

In *Thompson Steel Co.* v. *Boylston Insurance Co.*, 12 Mo. App. 244, the insurance was on iron shipped in a barge; the barge sank, the insured abandoned, and the insurer, after some delay, caused the goods insured to be raised and forwarded to their destination. It was held that the insured could not recover, and the Court said, "The mere act of abandonment confers no right on the assured, unless it be accepted by the insurer or be done under circumstances which render the right unquestionable." In that case, as in the case at bar, the plaintiff's abandonment was not justified by the facts; in that case, as held by Judge Putnam in the case at bar, the defendant procured the delivery of the goods insured at the port of destination, and yet in that case the plaintiff was not permitted to recover. We submit that *Thompson Steel Co.* v. *Boylston Insurance Co.* is a precise authority on the point presented here. Such cases as *Northwestern Transportation Co.* v. *Continental Insurance Co.*, 24 F. R. 171, *Norton* v. *Insurance Co.*, 16 Ill. 235, depend upon the principle that, if the insurer deals with the property insured, he must deal with it in a reasonable manner and not negligently or wantonly injure the insured.

We think we have shown that, even if it be assumed that the forwarding of the goods from Key West to Velasco was the act of the defendant, yet that this act, being reasonably done for the care and preservation of the property, cannot be taken as transforming an unqualified refusal to accept the abandonment into an unqualified acceptance of the same. However the plaintiff may now criticise the conduct of the defendant in forwarding the goods, there can be

little doubt that, if the injured goods had been uninsured, the plaintiff itself would have forwarded them in substantially the same manner. To have sold them at Key West would have been impossible, or at least improvident. It was not shown (Record, page 88), nor could it have been shown, that the acts of the defendant have caused the plaintiff any loss or deprived it of any profit. We believe that the defendant acted in the exercise of its rights as an insurer, but even if it erred in its construction of those rights yet its error does not make it liable for a total loss.

See Record, page 142.

It is asserted in plaintiff's brief (page 25), that "the purpose of the saving and forwarding of the cargo to the port of destination was not in order to save property, but to prevent the plaintiff from recovering his insurance."

This is not a fair statement of the facts. From the time that the "Benjamin Hale" went aground, the plaintiff made no attempt to save the goods, but bent all its energies to the pursuit of the insurance money. The motive of the defendant in helping to save the goods and in advising their forwarding from a place where they were worthless to the place where they were most valuable, was, doubtless, in part, to save its own pocket. The interest of the defendant was to save the goods; the plaintiff acted as if its interest was to leave them to perish and to depreciate their value. With the advice and help of the defendant they were brought to their destination worth a very considerable sum of money. If the plaintiff had not injured their market by refusing to receive them when tendered, their value would doubtless have been very much greater than the price brought by them at a forced sale. The sole object of the sue and labor clause in an insurance policy is to make it for the pecuniary interest of the parties to save the goods; to make the private interest of the insurer coincide with the general interest of the community in preventing a loss of valuable property; to give the insurer a pecuniary interest in the preservation of the goods insured. In doing what it did the insurance company in all good faith was protecting its own pocket and the interests of the public at the same time.

3. It is further argued by the plaintiff that there was such delay in forwarding the goods from Key West to Velasco as amounts to an acceptance of the abandonment. Admitting, in this place, for the sake of argument, that the forwarding was done by the defendant, and that for such delay as actually existed the defendant was responsible, yet we are unable to find any evidence of any unreasonable delay whatsoever; on the contrary, the evidence seems to show that the goods could not have been forwarded to Key West at any time before they were sent forward by the "Cactus." Had the goods been uninsured, and had the plaintiff itself used the utmost expedition reasonably possible, they would have reached Velasco no sooner.

Again, the plaintiff contends that the sale of the goods made at Velasco amounts to an acceptance of the abandonment. On this point it is sufficient to say that if, previous to the sale, there was a constructive total loss and a sufficient abandonment, then the defendant was liable before the sale, and his liability was not increased by it. If, on the other hand, the facts previous to the sale did not constitute an acceptance of the abandonment by the defendant, then the goods after their arrival at Velasco were at the plaintiff's risk, and, as the sale was made with the plaintiff's knowledge, and without its interference, the defendant cannot be made responsible for any loss which the plaintiff sustained thereby. The sale of the goods does not affect the case one way or the other.

The plaintiff also contends that the defendant is liable by reason of the difference between the terms of the charter of the "Cactus" and those of the charter of the "Benjamin Hale." Supposing, for the purposes of this argument, that the forwarding of the goods was actually done by the defendant, we cannot do better than adopt the language of the Judge's Charge (Record, page 144). This was one of the minor matters which "should have been raised at the time if it was to be insisted upon by the plaintiff." Such matters "cannot be taken advantage of here now, not having been insisted on at the time when they occurred." "If they had then been insisted on they could have been easily adjusted by the underwriters, and the difficulties removed." Hanna, the defendant's agent, instructed Moreno to see that the cargo was shipped according to the original bill of lading, and probably

Moreno so advised Hall; we suppose that the defendant never heard of the matters now complained of until the trial of the case. There is no evidence that the defendant or any of its agents ever saw the charter party of the "Cactus." We contend, as stated above, that the instructions of Hanna to Moreno did not contemplate a forwarding by the defendant, but only advice to the captain of the "Benjamin Hale" to forward. If, however, they be taken as contemplating an actual forwarding by the defendant, then they show that the defendant attempted to pay all charges, and would have paid those complained of, if requested by the plaintiff. In this connection, we would call attention to the letter written by the defendant's agent (Record, page 127), in which the defendant specifically asked the plaintiff upon what grounds the abandonment was based. It is clear that no ground was suggested except the general liability of the defendant for a constructive total loss of the goods insured. See telegram of plaintiff to Cragin, Record page 34. In *Dickey* v. *Insurance Co.*, 4 Cow. 222, 244, the Court said: —

"Undoubtedly the assured has a right to claim that his possession shall be absolute and perfect. He is not bound to relinquish his claim for a total loss, if, in reality, there is a lien or incumbrance attached to the vessel. But the abandonment was not put on this ground; it is stated to be in consequence of the disaster and the great injury to the voyage. In making the abandonment, the assured must assign the true causes. If he assign an insufficient cause, he is bound by it, and cannot avail himself of a new subsequent event without a new abandonment."

If, as we contend, and as the Circuit Court of Appeals stated, the "sounder opinion" is that the forwarding was not the act of the defendant, but that of the captain of the "Benjamin Hale," then, of course, the defendant was not responsible for its insufficiency.

III.

As to the plaintiff's suggestion that in deciding this case the Court is bound by the decisions of the Supreme Court of Massa-

chusetts, we cannot do better than adopt the statement of the Judge's Charge (Record, pages. 137, 138).

See *Gloucester Insurance Co.* v. *Younger*, 2 Curt. 322.

Upon the whole case, therefore, we submit that the writ of certiorari should be denied.

To hold that the defendant is liable for a constructive total loss of the goods insured, would be to reverse the rule of insurance law laid down in many cases, and unquestioned except in Massachusetts, where the rule applicable to the case at bar is not yet settled.

To hold that the defendant's acts done after his express refusal to accept the abandonment amounted to an acceptance of it, would be to disregard the view of the facts taken by both the Circuit Court and the Circuit Court of Appeals, which view is, furthermore, reasonable and well founded.

FREDERIC J. STIMSON,
of Counsel.

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Brief of Stimson
Filed Jan. 24, 1899.
U. S.
JAN 24 1899
JAMES H. McKENNEY,

Supreme Court of the United States.

OCTOBER TERM, 1898. No. 203.

THE WASHBURN & MOEN MANUFACTURING CO.,
Plaintiff,

v.

THE RELIANCE MARINE INSURANCE CO.,
Defendant.

BRIEF OF THE DEFENDANT,

THE RELIANCE MARINE INSURANCE CO.

FREDERIC JESUP STIMSON,
of Counsel.

quence to Record are to the
ld (marginal) page numbers.

Supreme Court of the United States.

THE WASHBURN & MOEN MANUFACTURING COMPANY

v.

THE RELIANCE MARINE INSURANCE COMPANY.

BRIEF OF THE DEFENDANT THE RELIANCE MARINE INSURANCE COMPANY.

This was an action removed from the Superior Court of Massachusetts to the United States Circuit Court for that district, and brought to recover the amount of a policy of insurance on a cargo of wire shipped on the schooner "Benjamin Hale" from Boston to Velasco, Texas. The policy contained the usual memorandum clause, to wit:—

"MEMORANDUM. It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, . . . are warranted by the assured free from average, unless general."

And also the following clause, stamped with a rubber stamp on the margin of the policy: "Free of particular average but liable for total loss of a part if amounting to five per cent."

The "Benjamin Hale" grounded on Bird Key, April 19, 1893, and in consequence the goods insured, "though not wholly submerged" (Record, pp. 23, 89, 91, 95, 99, 102), were injured to an amount exceeding fifty per cent of their value. The plaintiff made a seasonable and sufficient abandonment of the goods, which the defendant refused to accept. The "Benjamin Hale" was condemned and sold at Key West under a libel for salvage, and subsequently nearly all the goods were forwarded on the schooner "Cactus" to Velasco, where they were tendered to the plaintiff, who refused to receive them. At the time of tender, a very large part of the goods existed in specie, and a

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substantial part of them were practically uninjured. The goods were afterwards sold by order of court on the libel of the master of the "Cactus" for freight and charges. The plaintiff contended, —

I. That under the terms of the policy the defendant was liable for a constructive total loss of the goods insured; and

II. That the defendant and its agents so dealt with the goods after the damage was sustained that their action amounted to an acceptance of the plaintiff's abandonment.

The Circuit Court (Putnam J.) ruled: —

1. That under the terms of the policy the plaintiff could not recover for a constructive total loss, but only for an actual total loss of the goods insured, and that there was no actual loss; and

2. That there was no evidence of an acceptance by the defendant of the plaintiff's abandonment.

As there had been an absolute total loss of more than five per cent of the goods insured, a verdict for the value of the goods so lost was rendered for the plaintiff.

To the rulings above mentioned the plaintiff filed exceptions, which were heard by the Circuit Court of Appeals and overruled.

Washburn & Moen Mfg. Co. v. *Reliance Ins. Co.*, 82 F. R. 296.

I.

Was the defendant liable under the terms of the policy for a constructive total loss of the goods insured; that is to say, was it liable if, as in this case, nearly all of the goods reached the port of destination in specie and a substantial portion entirely uninjured?

In an elaborate and considered opinion, put into the form of a charge to the jury, Putnam, J., held that the defendant was not liable. The charge contains a careful review of many of the authorities.

Record, page 137.

On appeal, the Circuit Court of Appeals recognized that the rule laid down by Judge Putnam rested upon an unbroken series of decisions made by the Supreme Court of the United States, and therefore somewhat briefly overruled the exceptions.

The plaintiff asks this Court to overrule these two concurring deci

sions, basing his request upon the ground that they are contrary to the decisions in England and in Massachusetts.

That the rule adopted in England differs from that adopted throughout the United States, we fully admit. The difference is recognized by all writers on marine insurance. For a fuller discussion of this point see page 17, *infra*.

That the rule regarding liability for a constructive total loss adopted in one or two cases in Massachusetts differs somewhat from that adopted in every other jurisdiction of the United States where the question has arisen, we admit. The difference is recognized in at least one text-book, and is fully discussed by Judge Putnam.

2 Parsons on Marine Insurance, 112, 117.
Record, p. 139.

The Supreme Court of Massachusetts, however, has not passed upon the question presented by this case; but on the contrary has distinctly recognized that even in Massachusetts the question raised by this case is still open.

See Charge of Judge Putnam, Record, page 139, and page 16, *infra*, of this brief.

The rule adopted by the Circuit Court and by the Circuit Court of Appeals has been declared or recognized, —

By the Supreme Court of the United States, in a series of carefully considered decisions, beginning in 1813 and ending in 1873, since which last time no one has cared to question it;

By the Circuit Court of Massachusetts, speaking by Judge Story.

By the Supreme Court of Maine, speaking by Chief Justice Shepley.

By the Supreme Court of Louisiana, in two cases;

By the Court of Appeals, and other courts of New York, in a series of many cases, beginning in 1803 and ending in 1888.

By the Supreme Court of Pennsylvania in an early case never questioned since;

By the Supreme Court of Missouri.

Except in Massachusetts, the rule has never been questioned judicially. The plaintiff asks the Supreme Court to overrule or disregard all these cases in order to accommodate itself, not to the decisions of

the Supreme Court of Massachusetts (for that court has expressly refused to decide the question raised in this case), but to what the plaintiff thinks, perhaps correctly, should be the logical consequence of one or more of those Massachusetts decisions. If he should prevail, confusion would be introduced, and a well-established principle of marine insurance would be overthrown. It may reasonably be hoped that the Supreme Court of Massachusetts, when the question is again presented to it, will put itself into agreement with the other courts of the United States. We submit that it is unreasonable to ask the Federal courts and those of many States to put themselves into agreement with the dictum of the courts of one State.

We subjoin a detailed consideration of the terms of the policy, and a review and discussion of the decided cases.

Under the terms of the policy, the defendant undertook no liability for a constructive total loss of the goods insured, but only for an actual total loss. In other words, the defendant was not liable if a substantial portion of the goods insured reached the port of destination in specie and practically uninjured. The defendant's liability was limited by two clauses in the policy: —

First. The memorandum clause, of which the essential part reads as follows: —

"MEMORANDUM. It is also agreed that . . . wire of all kinds . . . are warranted by the assured free from average, unless general"; and

Second. Upon the clause written on the margin of the policy, "free of particular average, but liable for absolute total loss of a part if amounting to five per cent."

Record, pages 109, 111.

The marginal clause and the memorandum are to be taken together; they have the same meaning and are in no sense contradictory. Both are qualified by the exception stated in the latter clause: "but liable for absolute total loss of a part if amounting to five per cent." Undoubtedly, a clause written in the margin of a policy controls the printed memorandum so far as the two differ; but on the point that is material in this case, the marginal clause does not differ from the memorandum but simply reinforces it. The words "free from particular average" in the margin are equivalent to "free from average

unless general" in the memorandum, since average must be either general or particular; and the words are recited over again merely to indicate clearly that the words which follow, insuring against "absolute total loss of a part," are not intended otherwise to relax the provisions of the memorandum.

See *Chadsey* v. *Guion*, 97 N. Y. 333.
Brooke v. *Louisiana Insurance Co.*, 5 Mart. N. S. 530.
Insurance Co. v. *Fogarty*, 19 Wall. 640.

In the first-named case the letters "F. P. A." were not considered to take the goods insured out of the category of memorandum articles.

See also Judge's Charge, Record, page 139.

So in this case the marginal note does not take the articles insured out of the category of memorandum articles, but merely qualifies the nature of the memorandum.

The exception to the provisions of the marginal clause does, however, plainly fix the meaning of that clause. "Free from particular average, but liable for an absolute total loss of a part if amounting to five per cent," plainly means *not liable except for an absolute total loss, but liable for absolute total loss of a part.* If there be any doubt, therefore, of the meaning of the words "free from average unless general," or "free from particular average," the qualifying exception to the clause written on the side of the policy establishes an *expressed* intention of the parties to make the underwriter liable only "for absolute total loss" — of a part, or the whole; but actual loss, not constructive, in either case. That the word "absolute" has the same legal meaning as *actual*, see

Monroe v. *British & Foreign Insurance Co.*, 52 F. R. 777.

The plaintiff sought to draw a distinction between memorandum articles and articles not perishable in their nature, and hence he maintains that the wire injured in the case at bar was not a memorandum article.

Plaintiff's Brief, *on Certiorari*, page 8.

We submit that there is but one definition of a memorandum article known to the law, viz., any article mentioned in the memorandum. If any article be named in the memorandum of a particular policy, it becomes, so far as that policy is concerned, a memorandum article. The memorandum itself distinguishes between different articles mentioned therein, and expressly applies to each article the rule which is adapted to its nature. There is no warrant in reason or in authority for applying a different rule to articles included with the consent of both parties under the same rule by the express language of the memorandum. In *Waln* v. *Thompson*, 9 S. & R. 115, 117, 119, an attempt was made to draw a distinction like that contended for by the plaintiff, but the Court disregarded the attempt.

It is the general rule of law that memorandum articles, or articles warranted free of particular average, free from average unless general, or however otherwise the meaning may be expressed, are insured only against an actual total loss. This rule is well established in the Supreme Court of the United States and in the courts of this Circuit. In the Supreme Court of the United States every justice except eight, since the accession of Marshall, and including Marshall, has actually concurred in the opinions stating this rule, — twenty-three justices in all; and the opinions were written by Livingston, Story, Washington, Nelson and Miller.

In *Marcardier* v. *The Chesapeake Ins. Co.*, 8 Cranch, 39, a part of the goods insured were "memorandum articles," that is to say, they were warranted "free from average, unless general." (See contemporary form of memorandum in Marshall on Insurance, 1st Am. ed, Boston, 1805, page 139 *et seq.* See also 8 Cranch, 42, 43.)

The plaintiff claimed damages for a constructive total loss of this part of the goods; but the Court refused to allow this. After stating the American rule applicable in the case of ordinary goods, viz., that a damage exceeding fifty per cent entitles the insured to recover for a total loss, Mr. Justice Story added: —

"But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would

authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed."

The learned counsel for the plaintiff was in error in the statement, made on page 12 of his brief in support of the petition for the writ of *certiorari*, that the abandonment in this case was made too late. It is expressly stated that the abandonment was seasonable. See 8 Cranch, 41.

One year before this was decided the case of *Biays* v. *Chesapeake*, 7 Cranch, 415, not so directly on the present point, because the principal question of discussion was whether in a case of insurance upon hides or upon a distinct number of articles there might be a total loss as to some of them, notwithstanding the memorandum clause; but the opinion, by Mr. Justice Livingston, is important, as the case broke what was then new ground in this court, and therefore discussed more fully the general principle of the exemption of memorandum articles from constructive total loss. Thus, the Court say:—

"Whatever may have been the motive to the introduction of this clause into policies of insurance, which was done as early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article by its own perishable quality — or whatever ambiguity may once have existed from the term '*average*' being used in different senses, that is, as signifying *a contribution to a general loss* and also a *particular or partial injury* falling on the subject insured, it is well understood at the present day, with respect to such [*i. e. memorandum*] articles, that underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average. It only remains then to examine, and so the question has properly been treated at bar, whether the hides, which were sunk and not reclaimed, constituted a total or partial loss within the meaning of this policy. It has been considered as total by the counsel of the assured, but the Court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite eight hundred

were lost, making in point of value somewhat less than one sixth part of the sum insured by this policy. If there were no memorandum in the way, and the plaintiff had gone on to recover, as in that case he might have done, it is perceived at once that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue (which in this case amounts to much the greatest part), arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so, as long as a part continues to be less than the whole. This loss then being a particular loss only, and not resulting from a general average, the Court is of opinion that the defendants are not liable for it."

In the case of *Morean* v. *The United States Ins. Co.*, 1 Wheaton, 219, a part of the cargo consisted of "memorandum articles"; that is to say, goods warranted free from average, unless general. In delivering the opinion of the Court, Mr. Justice Washington said:–

"All considerations connected with the loss of the cargo, in respect to quantity or value, may, at once, be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception.

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the insured can demand as for a total loss, that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and, consequently, he cannot elect to turn it into a total loss." ...

"The only question that can possibly arise in relation to memorandum articles is, whether the loss was total or not; and this can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagements; every

thing like a promise of indemnity against loss or damage to the cargo being excluded from the policy."

The learned counsel for the plaintiff, in the same brief (page 12), said that these two decisions are at most mere dicta. We submit that they are, on the contrary, carefully reasoned decisions upon the question raised by the case at bar.

In the case of *Hugg* v. *The Augusta Insurance Co.*, Taney, 159, 7 How. 595, the insurance was upon freight on articles warranted free from average, and the Court throughout treated the case as governed by the principles applicable to similar insurance upon a cargo. In delivering the opinion of the Court, Mr. Justice Nelson said, "In this country the rule has been uniform that there must be a destruction of the article in specie, as will be seen by reference to the following authorities" (quoting, among other cases, *Brooke* v. *Louisiana Insurance Co*, *Morean* v. *United States Insurance Co.*). "The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriters against the strong temptation that may frequently exist on the part of the master and shipper to convert a partial into a total loss." (7 How. 605, 606.)

The learned counsel for the plaintiff, in the same brief (page 12), said that this case decided that there could be a recovery for a total loss of freight if the goods on the vessel were lost. What the case decided was this: that the defendant was not liable for a total loss of freight unless it appeared that there was a destruction in specie of the entire cargo.

See the Order of the Court, 7 How. 611.

And this doctrine has most recently been reaffirmed (as to insurance on profits) in the Circuit Court of Appeals for the Second Circuit, reversing the decree of the Circuit Court, in the case of *Insurance Co. of North America* v. *Canada Sugar Refining Co.*, 87 Fed. Rep. 491.

"Under a contract of insurance of the profits on a cargo of sugar 'against total loss only' there is no actual total loss of profits where any part, however small, of the cargo, is saved and reaches the owner in condition to earn a profit; and in such case no recovery can be had."

This is the headnote. Judge Wallace's words were: —

"There can be no actual total loss of profits when part of the goods arrive in condition to earn a profit (*Loomis* v. *Shaw*, 2 Johns. Cas. 36), notwithstanding a greater part have been destroyed by the perils insured against" (*Waln* v. *Thompson*, 9 Serg. & R. 115).

And to show that Judge Wallace had fully in mind cases cited by the learned counsel for the plaintiff in error in his brief, he goes on to say: —

"By the latter authorities it is settled that under a policy insuring a ship or cargo against 'total loss only' the assured is entitled to recover upon proof of a constructive total loss. *Adams* v. *Mackenzie*, 13 C. B. (N. S.) 422; *Heebner* v. *Insurance Co.*, 10 Gray, 131; *Greene* v. *Insurance Co.*, 9 Allen, 217; *Burt* v. *Insurance Co.*, 78 N. Y. 400; *Carr* v. *Insurance Co.*, 109 N. Y. 504, 17 N. E. 369; *Snow* v. *Insurance Co.*, 119 Mass. 592. It is a reasonable intendment that when an underwriter offers to indemnify the insured against a 'total loss' he means to be understood to include any loss which the latter may justifiably treat as total. If he contemplates a more limited liability, he can protect himself by insuring against actual or absolute total loss,"— thus expressly stating that the words "actual" and "absolute" both mean what they say; that is, a real loss as opposed to a constructive.

In the case of *Insurance Co.* v. *Fogarty*, 19 Wall. 640, the insurance was on machinery warranted in the memorandum clause "free from average unless general," and further warranted by the insurance "free from particular average." The plaintiff sought to recover for a total loss. It does not appear explicitly that the insured made a formal abandonment, but, as appears from the record in the case, page 18, the declaration stated that two days after the loss, "he (the plaintiff) produced and made to the said defendants due proof of loss and of his interest," and this act, the equivalent of an abandonment, seems to have been assumed or admitted at the trial. The Court, after an elaborate discussion of *Marcadier* v. *Chesapeake Insurance Co.*, *Morean* v. *Insurance Co.*, and some other cases, laid down the rule that in the case of a warranty like that just quoted, the plaintiff could not recover if any part of the machinery reached its place of destination still existing as machinery. The plaintiff was allowed to recover on the ground that the stuff which

reached the port of destination was not machinery but merely old iron. It appeared that the value of the stuff saved was less than the cost of saving it (see the Record in the case, pages 33, 35, 42), but this fact was not treated as a cause for recovery.

The statement of this case made by the learned counsel for the plaintiff in the same brief (page 13) was somewhat inaccurate. About one half the weight of the machine was saved, but less than one fortieth of its value (see 7 Wall. 641), and the value of the part saved was less than the cost of saving it. The Court did not hold, as stated by the learned counsel for the plaintiff, "that the plaintiff could not recover for a total loss, as the goods were not in peril when the abandonment was made." The Court said nothing whatsoever about the abandonment (indeed, the word does not occur in the opinion, except casually in a quotation), probably because, as has been shown, *supra*, an abandonment had been made within two days of the loss, and while all the goods insured were under water. What the Supreme Court did in *Insurance Co.* v. *Fogarty* was to hold that the plaintiff could recover if the machinery injured had ceased to exist as machinery, and that the charge of the judge to that effect in the court below was correct.

Coming now to the circuit from which this cause arose, we find, first, the case of *Robinson* v. *The Commonwealth Ins. Co.*, 3 Sumner, 220, where the policy contained a clause freeing the insurers from liability "for any partial loss on goods esteemed perishable in their own nature." The goods insured were held to be perishable, and so the case stood as if the goods had been declared specifically to be free from particular average.

In addressing the jury, Mr. Justice Story said: —

"The principle of law is very clear, that, as this is an insurance on a perishable cargo, the plaintiff is not entitled to recover unless there has been a total loss of the cargo by some peril insured against. If the schooner had arrived at the port of destination with the cargo on board physically in existence, the plaintiff would not have been entitled to recover, however great the damage might have been by a peril insured against, even if it had been ninety-nine per cent, or in truth even if the cargo had there been of no real value."

In the case of *Monroe* v. *The British & Foreign Marine Ins.*, 52 F. R. 777, the insurance was on cattle, and the policy contained the

following clause: "against absolute total loss of vessels and animals only."

It was argued that under the policy the defendant was liable for a constructive total loss, but the Court held otherwise. See page 788.

The principles above stated have been supported and established by the opinions of the best writers on insurance, and by many cases in the courts of the several States.

Phillips on Insurance, ed. 1867, Sections 1615, 1767.
2 Parsons on Insurance, ed. 1868, 111.

In the case of *Brooks* v. *Louisiana Insurance Co.*, 5 Mart. N. S. 530, 535, it was said by the Court "that nothing short of an absolute destruction of the whole property insured would render the assurers responsible, and if any portion reached the port of destination, they were discharged from liability."

In *Skinner* v. *Western Insurance Co.*, 19 La. 273, the Court approved the statement of Mr. Phillips, that "from most of the cases, it seems that although they (the goods insured) are so damaged as to be rendered absolutely of no value, still, if they remain in specie, if they so subsist that they may still be properly designated by the same name, the underwriters are not liable for a total loss." In this case, the doctrine was carried to its extremest limit. The article insured was raw pork, and the remnant of pork which arrived at the port of destination reached it as "roasted or barbacued" pork; yet the Court held that the pork still existed in specie, and that there could be no recovery.

In *Williams* v. *Kennebec Insurance Co.*, 31 Maine, 455, 463, the insurance was on cargo and freight, not liable for partial loss, and the Court said, "If (a perishable) article or any part of it arrives at the port of destination in specie, or can, with reasonable care and diligence, be carried there in that condition, although it may be worthless there, there can be no total loss." See also Judge's Charge, Record, page 139.

Willard v. *Manufacturers Insurance Co.*, 24 Mo. 561, 566;
Waln v. *Thompson*, 9 S. & R. 115, 120;

in both which cases the rule laid down by the Supreme Court of the United States was fully recognized.

In the courts of New York it was early decided that the insurers were not liable for a constructive total loss of memorandum articles. And "on a commercial question especially, or one deeply interesting to merchants and to merchants only, the settled law of New York is entitled to great respect."

MARSHALL in *Spring* v. *Gray*, 5 Peters, 151 at page 168.

See

Maggrath v. *Church*, 1 Caines, 196, 211.

Neilson v. *Columbian Ins. Co.*, 3 Caines, 108.

Wadsworth v. *Pacific Ins. Co.*, 4 Wendell, 33, 39 (*free from average unless general*).

DePeyster v. *Sun Ins. Co.*, 19 N. Y. 272 (*free from average unless general*).

The case of *Wallerstein* v. *The Ins. Co.*, 44 N. Y. 204, has sometimes been treated as establishing the contrary doctrine, but an examination of the case will show that it does nothing of the sort. Defendant insured the plaintiff on coffee valued at about $25,000, and on wool valued at about $4,000, *free of particular average only*. Ship was sunk and abandoned by the insured. Under instructions from the insurers, salvors succeeded in saving about $1,000 worth of the wool, and less than $3 worth of the coffee. Suit was brought for a total loss. It was admitted both in the court below and in the court above that no recovery could be had for the insurance on the wool, although damaged to the amount of nearly seventy-five per cent (see *Burt* v. *Brewers' Ins. Co.*, 9 Hun. 383, 388); but a recovery was had for the coffee as for a total loss, the Court holding, apparently, that it had totally perished, and that the recovery of an insignificant amount, both in quantity and value, was merely illusory, amounting to a fraud on the part of the insurers. It is true that the opinion of the Court casts some doubt upon the doctrine laid down in the case of *Morean* v. *The Ins. Co.*, above cited, but later decisions make it plain that the Court of Appeals in New York fully accepts the doctrine of the case last cited.

In *Burt* v. *The Brewers' Ins. Co.*, 9 Hun. 383, the insurance was "against actual total loss only." This phrase was assumed throughout to mean the same thing as the memorandum clause, and the Court said (page 386): "The meaning of (the memorandum) is that

there can be no partial loss, and that there must be an actual destruction of the article specified in the memorandum, and not merely such a technical total loss as would authorize an abandonment."

The Court further said (page 388):—

"It is supposed by the appellant that the case of *Wallerstein* v. *The Ins. Co.* has laid down a different rule as regards memorandum articles from that which we have hereinbefore relied on as a settled rule of law on the subject. We do not so interpret that case. There the insurance was upon wool and coffee free from average unless general."

"The coffee became wholly lost to the owner, that is, its entire value became lost, though the coffee remained in specie. But no recovery was allowed for the wool, though its value had been $3,961 and sold after the damage at $1,100.02 in excess of the auctioneer's charges, and this balance was subject to a deduction of sixty per cent for salvage, leaving only $440, or about one ninth of the value. It is true, it is said in that case, that absolute physical destruction is not necessary to constitute a total loss, but only a destruction of the thing insured, as the thing it was when insured. The coffee, though the berry still existed, was no longer coffee in the mercantile sense of the word, and could not be restored by any amount of expenditure." This case throughout treats the memorandum clause as equivalent to "against actual total loss only."

In the same case on appeal, 78 N. Y. 400, the Court of Appeals sustained the decision of the Supreme Court and said, "The well considered opinion of Talcott, J., at the General Term, renders it needless to add more."

In *Chadsey* v. *Guion*, 97 N. Y. 333, there was the usual memorandum warranty that the goods were "free from average unless general." The letters "F. P. A." (free from particular average) also were written in, yet the Court throughout treated the goods insured as still memorandum articles, and it cited *Morean* v. *The U. S Ins. Co.*, with approval, and assumed that *Wallerstein* v. *The Ins. Co.* agrees with it. It is true that in *Chadsey* v. *Guion*, the Court said that by the memorandum clause it was the intention of the parties to confine their liability to the absolute or constructive loss of the entire cargo. Whatever the word "constructive" may mean as used here, if, indeed, it be not a mere slip of the pen, plainly it does not refer to a fifty per cent loss; for in *Chadsey* v. *Guion* there

was a loss of over ninety per cent, and yet the Court would not allow the plaintiff to recover. And in another part of the opinion it is said: "An underwriter is not accountable for a partial loss on memorandum articles, except for general average, unless there is a total loss of the particular species"; and again, any dealing with the property "by the assured which results in the preservation of a substantial part of it (cargo insured), so that it may be delivered in safety and in good order at the port of destination, discharges the obligation of the assurers." 97 N. Y. 338.

In *Merchants S. S. Co.* v. *Mutual Ins. Co.*, 19 Jones & Spencer, 444, 455, the insurance was on a vessel "free of particular average," and the Court said: —

"The rest of the policy, and particularly the written clause 'free from particular average,' fixes what claim may be made. That under this claim (*sic*, for clause) a constructive total loss cannot be claimed is generally declared to be the law. This is founded upon reason. The rule as to technical or constructive total loss was made from a necessity there was, many times, of determining whether, when some part of the thing insured remained after a loss, it could be correctly held that there was actual total loss. If what was left was inconsiderable as to any of the uses or advantages of the subject when whole, it would only be literally true that the loss was not total, while really the owner would be more likely to abandon the remnant than try to save it.

"How large or great a quantity might be left and yet there be a total loss was determined, not by attempting to ascertain the value of the remnant directly, but by ascertaining what the loss was; namely, the cost of repair, after the reduction of new for old, and if the cost were more than one half of the value of the thing insured, then it was deemed that the remaining half, represented by the actual remnant, was not so considerable that its existence should prevent a legal conclusion that there was actual total loss. It was not denied that in such case the insurers paid for what was only a partial loss, indemnifying themselves by taking the remnant. In many cases there was no doubt that there was no total loss actually. If the parties contract against such a method of judgment, the law will carry out their intent. The clause against particular average or partial loss means that the insurer will not pay what is in fact a par-

tial loss, under any circumstances, and therefore not for a constructive total loss, for the latter is really a payment for a partial loss, and for a constructive value of the remnants. There is no such thing as a constructive partial loss."

Finally, in the case of *Carr* v. *The Security Ins. Co.*, 109 N. Y. 504, 509, the goods were insured "against actual total loss only"; and the Court said that "the cases in this State, in respect to memorandum articles, where the insurer is liable only for an actual total loss, in the main, sustain the view that total loss in value of memorandum articles, so long as they remain in specie, is not an actual total loss of such articles within a policy of marine insurance."

It will be perceived that the last case goes much further than we need go in arguing the case at bar; and it brings the law of New York into full accord with that laid down by the Supreme Court of the United States in the case of *Morean* v. *The U. S. Ins. Co.*

In these cases the Court gave the same meaning to the various phrases, "free of particular average," "free from average unless general," "liable only for actual total loss," etc.

The plaintiff relies upon certain cases decided in the Supreme Court of Massachusetts. In *Kettell* v. *Alliance Insurance Co.*, 10 Gray, 144, it was decided that under the following clause, "partial loss on sheet iron, iron wire, braziers' rods, iron hoops and tin plates is excepted," the insurers were liable for a constructive total loss under the fifty per cent rule. In the opinion it was admitted that the insurers would not have been liable for a constructive total loss of memorandum articles, and the case was decided upon the ground, which was presented with some elaboration, that the goods insured differed in nature from memorandum articles. From the opinion it is perfectly clear that the court which decided the case would have decided the case at bar in favor of the defendant, inasmuch as in the case at bar the articles insured were memorandum articles. See the discussion of this case in the opinion of Judge Putnam.

Record, page 139.

The case of *Mayo* v. *India Insurance Co.*, 152 Mass. 172, followed the case just quoted, and accepted it as an authority. In that case the Court expressly refused to decide whether under the ordinary memorandum clause an insurer is liable for a constructive total

loss. "Whether in this Commonwealth there can be no total loss of a memorandum article, if any part of it arrives at the port of discharge in specie, . . . we express no opinion." 152 Mass. 175, 176. We believe that this is the only case in the courts of the United States in which it has even been intimated that the insurer may possibly be liable for a fifty per cent constructive total loss of memorandum articles. There are many cases holding precisely the contrary, while this case simply refuses to pass upon the point.

See the criticism on this case in

2 Parsons on Marine Insurance, 112, 117.

It is to be observed that the editor's note in Parsons was written by Mr. Lathrop, now justice of the Supreme Court of Massachusetts; and there is a note of like effect by Mr. Justice Holmes, now of the same court, in his edition of Kent, vol 3, p. 296.

In order to decide the case at bar in favor of the plaintiff, the Circuit Court and the Circuit Court of Appeals must have disregarded decisions made in many cases, and the rule adopted in many jurisdictions of the United States. To decide the case at bar in favor of the defendant, those courts were not required to disregard a single decided case or a rule adopted in any jurisdiction. They needed only to refuse to draw from the last of the Massachusetts cases a corollary which the Massachusetts court in its own opinion expressly refused to draw.

See remarks of Judge Putnam, Record, page 139.

We need not refer at length to the English cases. No doubt, at the present time, it is the law in England that for a constructive total loss of memorandum articles the plaintiff may recover, but it is also the law that the plaintiff cannot recover for a constructive total loss of any articles — memorandum or other — unless they are injured practically to the amount of one hundred per cent; that is to say, unless they are so injured as to be of no substantial value when brought to the port of destination. Thus the English rule is in effect nearly as rigorous as the American in respect of memorandum articles, while it is very much more rigorous in respect of articles

not included in the memorandum. Further comment on the English cases is unnecessary.

See 2 Chitty Pl., 16th Am. ed., 163, note c.
2 Arnould on Insurance, 6th ed., 952, 1005, 1014.

In the case at bar a large part of the goods insured reached Velasco in specie, a substantial part of them being wholly uninjured.

Deposition of Cragin, pages 28, 34.
Deposition of Cortes, page 71.
Deposition of Blum, page 105.

And most particularly see the contemporary memorandum of the Master of the ship, John Hall, which was signed by him and made in pencil the very day that the ship was brought to Key West and the cargo landed. The word "dam" in this memorandum means "damaged." It appears from this (Exhibits Nos. 11, 12, 14 and 18 Record, p. 122) that out of 11,775 reels of galvanized barbed wire and 1276 of painted barbed wire, which were actually shipped from Worcester, in all 13,051, no less than 12,277 were minuted by Captain Hall as landed at Key West, which sum was later increased, presumably by the reels brought back in other vessels, to 12,625 shipped by Captain Hall from Key West to Velasco as by the bill of lading of the Schooner "Cactus"; and by Captain Hall's memorandum it appears that 989 of these reels were perfectly dry, while 10,448 are marked by the Captain himself as having "hardly perceptible" damage. Of the plain wire, 1102 bundles were shipped, and every one was landed on the beach at Key West and duly transshipped to Velasco; and 464, or nearly half, are marked by Captain Hall as nearly dry.

When we come to the more valuable articles of the cargo, we find that the five reels of salamander wire were all landed and transshipped entirely dry and uninjured. The same is true of the wire rope and of 243 hay bands, of which 478 bundles were saved out of the 1102 shipped from Worcester.

It should be remembered that the fact that the cargo, originally valued at a little over $40,000 after it had passed through a wreck and had been refused reception by its consignees, who were also its man-

ufacturers and had a monopoly of the business in the State of Texas sold only for $10,000, is evidence rather of the slight amount of loss and damage incurred than of the contrary. When Washburn & Moen refused to accept their own wire, and it was sold as derelict, it is doubtful if it would have brought more than twenty-five per cent of its value, had it been perfectly good.

These depositions state the case most strongly for the plaintiff Cragin was the plaintiff's agent, and Blum, though called by the defendant, proved a hostile witness. Yet the statements of both make it abundantly clear that in the case at bar the injury to the goods insured was less than that sustained in the case of *Morean* v. *U. S. Ins. Co.*, and in the other cases cited above, where the Supreme Court of the United States did not allow the plaintiff to recover. It is entirely clear that there was no "absolute total loss" of the property insured, and that the Court could not have permitted the jury to pass upon the question.

Moreover, "the judges of the Federal Courts are not required to submit a question to the jury merely because there is some evidence in support of the case of the party who has the burden of proof, but at the close of the evidence it is their duty to direct a verdict for the party who is clearly entitled to it, when it would be their duty to set aside a verdict in favor of his opponent if one were rendered. At the close of the evidence there is always a preliminary question for the judge, —not whether there is literally no evidence, but whether there is any substantial evidence, upon which the jury can properly render a verdict in favor of the party who produces it."

So Judge Sanborn, Circuit Judge for the Eighth Circuit, restated the law as recently as November, 1897, fully citing the authorities, in the case of *Chicago, St. P., M. & O. Ry. Co.* v. *Belliwith*, 83 Fed. Rep., 437.

Defendant contends, therefore, that the Court was right in ruling that under the terms of the policy and the circumstances of the case. the defendant was liable only for an absolute total loss of a part of the goods insured. (See Plaintiff's Petition, page 9.) For that loss the plaintiff has been already reimbursed.

But a *certiorari* having been granted in this case, it is perhaps proper that a word in conclusion upon this, the main question in the cause, should be directed to broad grounds of public policy. Even

admitting, as we have shown, that the law of this court and of th Federal Courts, and of the United States generally, is, in fact, settle upon this point, is the law so unjust, or so illogical, or does it wo such hardship in its application that the American doctrine of co structive total loss on memorandum articles should be done aw with, and instead either the English rule adopted, under which the must be what we term a hundred per cent loss at the place of destin tion, including the expenses of transshipment from the place disaster, — or the doctrine of memorandum articles, with the F. P. clause, be done away with entirely, so that it is impossible for underwriter to exempt himself from paying the value of all the goo should an accident occur to some of them, or to some part of the and such deterioration of quality arise by reason of sea exposure peril, that the owner may give them up at an intermediate port on t chance that the loss caused by the forced sale and increased expens of transshipment may amount to fifty per cent of the invoice val of the goods?

To us it seems that to ask this question is to answer it. Leavi out the question whether the parties have not a right to make th own contract by an F. P. A. clause, as they have done in this insta — even though the doctrine as to memorandum articles be changed the reason and sense of the doctrine forbidding fictional total loss memorandum articles has never been better expressed than it was Mr. Justice Livingston of this court in the first case where doctrine was ever considered.

In *Biays* v. *Chesapeake*, *ut supra*, he says that the memorandu clause was introduced into policies at least "as early as the year 17 and most probably with the intention of protecting insurers agai losses arising solely from a deterioration of the article by its o perishable quality, . . . and as to such articles underwriters are f from all partial loss of *every kind* which do not arise from a contri tion towards a general average."

It is well known that shippers pay very much less for this kind insurance, free of particular average, than they pay on the same go for insurance against partial and constructive as well as actual to loss. The premiums on policies drawn like the one in the case bar do not generally amount to more than one third, or at most half, as much as in full policies without the F. P. A. clause. T

reason is obvious. Articles which are so easily deteriorated by the ordinary risks of the sea, be it exposure, or sea water, or the shaking up of the cargo on a long voyage, are so often partially injured that it is practically impossible for the underwriter to insure them at any reasonable rate. Thus we find that articles such as champagne, where the mere shaking and sweat of the hold is likely to damage the quality of the goods, or such as goods easily rusted, like the very wire in this case, have always been peculiarly the subject of the memorandum clause. Almost any change to such articles, resulting from an accident or exposure, however slight, is likely to injure their value sufficiently, at least at a forced sale after abandonment, as to bring them within the fifty per cent rule. No better example of that could be chosen than this very case, — where nearly ninety-five per cent of the goods were finally delivered in specie, and a very substantial percentage, indeed, entirely uninjured, yet the amount realized at the sale was less than twenty-five per cent of their invoice value. But a slight loss of cargo took place in this case, and it well shows that if the constructive total loss rule is to be applied to such articles, almost every accident or injury would result in a total loss, and underwriters would either have to cease insuring such goods or go out of business.

II.

Was there evidence of the acceptance by the defendant of the abandonment made by the plaintiff?

This is a mixed question of law and fact, and a question of fact much more than of law. The judge of the Circuit Court had the advantage of hearing the testimony of some of the witnesses, and he carefully considered the depositions of the others. It was proved that the defendant expressly refused to accept the abandonment made by the plaintiff, and the learned judge could find no evidence strong enough to control this express refusal. The Circuit Court of Appeals reconsidered the same testimony, and, while agreeing with the result reached by the Circuit Court, took a view of the testimon distinctly more favorable to the defendant than that taken by Judge Putnam. No important question of the law of insurance is involved in this branch of the case, and we submit that there is no good reason why the Supreme Court should reconsider a question of fact which has

been carefully considered and unanimously decided by two competent tribunals.

It is not correct to say, as plaintiff's brief does on page 10, that the abandonment was made while the vessel and cargo were both submerged, and apparently never could be saved. At that time a large portion of the cargo, at least, was saved, and a considerable quantity landed perfectly dry on the beach at Tortugas. Moreover, the ship had been pulled off, and was floating freely. (See Captain Hall's deposition, Record, page 21: "On April 24 he got some wreckers to go to the vessel . . . and she was floated on April 29, at 2 P. M.; stood into Tortugus at 3 P. M.; from the time the vessel went ashore until she came off they were taking the cargo out as they could so as to get her off. When she got off she was nearly all or partly pumped out . . . thinks about one half of cargo was discharged on the reef, of which he thinks about thirteen hundred reels were dry." Also St. Clair's deposition, Record, page 95, where it appears that he was loading cargo directly from the "Benjamin Hale" there, "somewhere around the 21st or 23d of April.") And while there was "evidence before the jury that the property, after being wet in salt water, was of no commercial value," there was also plenty of evidence, as we have said before, that a large portion of the property had not been wet with salt water at all.

For the purpose of reference, we subjoin an argument upon this branch of the case, taken, for the most part, from our brief addressed to the Circuit Court of Appeals.

Admitting, for the sake of argument, that the defendant was not originally liable for a constructive total loss, yet the plaintiff contends that such liability now exists by reason of the defendant's acceptance of the plaintiff's offered abandonment.

Was there, then, evidence of an acceptance by the defendant of the abandonment of the goods insured made to it by the plaintiff? It must be constantly borne in mind that the defendant refused to accept the plaintiff's abandonment in the most unqualified manner. The defendant's conduct must be considered in the light of its refusal. In spite of this refusal the plaintiff now contends that the defendant's acts subsequent to the refusal amounted to a retraction of it and the substitution for it of an acceptance.

The matter must be considered in two aspects. In his charge (see page 142), Judge Putnam said, (1) that he thought the forwarding of the goods from Key West to Velasco was made by the defendant; but (2) he ruled that such forwarding, under the circumstances, was not evidence of an acceptance of the plaintiff's abandonment.

1. The Circuit Court of Appeals did "not entertain the view of the Circuit Court that the underwriters chartered the 'Cactus' and forwarded by her the cargo from Key West to Velasco." "The sounder opinion" was by the Circuit Court of Appeals thought to be that those acts were done under the authority of the captain of the "Benjamin Hale." We submit that the Circuit Court of Appeals was right.

The facts were as follows: —

The charter party of the "Cactus" was made, not with the defendant, but with the master of the "Benjamin Hale," and was signed by him. (Record, page 120.) He authorized Messrs. Taylor & Curry, *his* agents at Key West, to charter the "Cactus," and they paid for the discharge of the cargo at Key West. (Record, page 23.) The bills for wharfage, etc., at Key West were made out to the owners and underwriters of the "Benjamin Hale," and not to the defendant or to the underwriters of the cargo. (Record, page 122.) The second bill of lading was signed by Mr. Taylor, of the firm of Taylor & Curry, agents for the "Benjamin Hale," and not for the defendants, as Capt. Hall testified. (See Record, page 23, 82 F. R. 296.) The goods are stated to be shipped by Capt. Hall, evidently with the intention of forwarding them to the plaintiff, to whom they were to be delivered. (Record, page 125.) The only evidence to connect the defendant with the forwarding is found in Capt. Hall's testimony, page 22, where he says that he received a request from the defendant's agent to forward the wire to Velasco. (His statement on page 23 that Mr. Moreno, the defendant's agent, did not wish him to take the cargo to Tortugas, but to go on to Key West, obviously has no connection with the forwarding to Velasco.) Capt. Hanna, the defendant's agent, testified that he instructed Mr. Moreno, the underwriter's agent at Key West, to see that a vessel was secured and the cargo properly shipped to Velasco, according to the original bill of lading; that he always insisted on Capt. Hall's forwarding the

cargo. (Record, page 86.) Taking all this evidence together, it shows, not that the defendant forwarded the cargo to Velasco, but that the defendant was very careful not to do so, and that the forwarding, though perhaps made by its advice, and even at its instance, was the act of the master of the "Benjamin Hale."

That it was the duty as well as the right of the captain of the "Benjamin Hale" to forward the cargo seems clear.

2 Parsons on Insurance, page 155.
2 Phillips on Insurance, Sect. 1624.
Abbott on Shipping, 13th ed., 411, 414.
Cannon v. *Meaburn*, 1 Bing. 243.
Shipton v. *Thornton*, 9 A. & E. 314.

Even if the transshipment were irregularly made or unauthorized, still it would not thereby become the act of the defendant. Let us suppose that A, a vendor, has shipped goods to B, a vendee, and that B, on examining the goods, promptly notifies A that they are not satisfactory. A controversy arises between A and B, and it is shown that B, while consistently and repeatedly denying ownership in the goods, yet has in good faith, and under a mistake of law, advised the common carrier to do acts which amount to a conversion of them. We have purposely stated the facts as strongly as possible against B, but we think it would be impossible to maintain that B's advice to the carrier, however urgent, operated as an acceptance by him of the goods.

We contend, therefore, that the Circuit Court of Appeals was right in holding that the forwarding to Velasco of the goods insured, though doubtless advised and urged by the defendant, was not its act, but the act of Capt. Hall. If this is true, the forwarding cannot, of course, be evidence of the acceptance by the defendant of the plaintiff's abandonment.

2. Supposing, however, as contended by the plaintiff, and according to the opinion of Judge Putnam, that the defendant itself did forward the goods to Velasco; was that act an acceptance of the plaintiff's abandonment?

We contend that both Judge Putnam and the Circuit Court of Appeals were right in holding that under the circumstances of the case, the forwarding of the goods, even if such forwarding be held

to be the act of the defendant, was not an acceptance by the defendant of the plaintiff's abandonment.

In discussing this question it is necessary briefly to consider the occasion of an abandonment, when it is necessary, and when and how it must be accepted. According to the law of insurance, goods insured, even though they be not actually destroyed, yet may be so greatly injured that the insured becomes entitled to treat his loss as constructively total. In such case, the insured, however, is not compelled to claim for a total loss; he may, at his option, treat the loss as partial or as total, but if he seeks to recover the total value of the goods, he must abandon them to the insurer within a reasonable time, and not keep the insurer in doubt concerning his intention. This abandonment must be timely; the insured must not speculate on the result of the peril insured against, nor can he wait to determine if a claim for a partial or for a total loss would be to his greater advantage. On the other hand, the insurer, in a case of doubt, is not permitted to speculate upon the event any more than the insured. He must not wait to determine if it will be to his greater advantage to accept the abandonment or refuse it. The obligation to abandon, and to accept or refuse an abandonment when made, is to some extent reciprocal. (See *Smith* v. *Robinson*, 2 Dow, 474, 479; *Hudson* v. *Harrison*, 3 B. & B. 97.) Probably it is true, as stated by Mr. Justice Story in *Peele* v. *Merchants Insurance Co.*, 3 Mas. 27, 81, that the insurer is not bound to state explicitly whether he accepts the plaintiff's abandonment or not, and that mere silence is to be construed as a refusal; but, if the insurer remains silent and makes no reply to the abandonment made by the insured, his position thereby becomes so ambiguous that a court will often look to his acts to construe his unspoken intention, and will sometimes construe such acts as an acceptance of the abandonment. Thus, in *Hudson* v. *Harrison*, 3 B. & B. 97, where the insured, after abandonment, called a meeting of the underwriters, and later notified them that the cargo was to be sold, to which notification the defendant paid no attention, while some of his fellow-underwriters were approving the acts of the insured in dealing with the property, the Court said: "The question is, therefore, whether the underwriters by lying by in the present instance have not in-

duced the assured to believe that the abandonment was acquiesced in."

So, also, in *Provincial Insurance Co.* v. *Leduc*, L. R. 6 P. C. 224, where the insured abandoned to the insurer the wreck of the vessel insured, to which abandonment the insurer made no reply, but took possession of the wreck, raised it, and afterwards allowed it to be sold, the Court held that, under the circumstances, the insurer must be held to have accepted the abandonment.

The case of *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, illustrates the principle just stated. The vessel insured was lost by a peril not insured against; but at the time of the abandonment, which was promptly made, this fact was unknown to the insurer, and very possibly also to the insured. The insurer thereupon took possession of the vessel and repaired it, but, having thereafter discovered that the loss was caused by a peril not insured against allowed it to be sold on a libel for repairs. The insured thereupon contended that these facts amounted to an acceptance of the abandonment, and requested the Court to charge the jury that the facts stated were evidence of the acceptance of the abandonment by the defendant. This the Court refused to do, though it seems that it left the question of the acceptance of the abandonment to the jury under some instructions not stated. The Supreme Court of the United States sustained the ruling of the Court below, and held that the facts stated were not evidence of an abandonment.

The same disaster was also considered by the Supreme Court of Michigan in *Northwestern Transportation Co.* v. *Insurance Co.*, 59 Mich. 214; *Richelieu Navigation Co.* v. *Insurance Co.*, 72 Mich. 571. In this case the additional fact was found that the insurer, having taken possession of the vessel, had never offered to return it to the insured. The Court, therefore, in the absence of any explicit statement by the insurer, held that the abandonment had been accepted, on the ground that such was the reasonable construction to put upon the insurer's act, and the judge delivering the opinion said, "I think the jury would have the right to construe the act most strongly against the defendant, for the reason that its interest was a matter entirely within its own knowledge, and by speaking it had the power to solve all doubts and dispel all ambiguities, and although no duty rested upon it to say whether it accepted the abandonment or not, so long as it was both

silent and inactive, yet, when it did act, its duty was to say for what purpose, and with what intent it proposed to act." 59 Mich. 234.

See to the same effect,

Cinn. Insurance Co. v. *Bakewell*, 4 B. Mon. 541.
Singleton v. *The Phenix Insurance Co.*, 132 N. Y. 298.
Peele v. *Merchants' Insurance Co.*, 3 Mas. 27, 83.

These cases establish that where the insured makes seasonable abandonment to the insurer, who makes no reply thereto, but leaves the insured in doubt concerning his intentions, then the acts of the insurer may in some cases be treated as an implicit acceptance of the abandonment.

This principle, however, has no application to the case at bar. Here the defendant declined to accept the abandonment as soon as the letter offering it was received (Record, pages 111, 115), and from that time forward persistently and unqualifiedly denied its liability and contested the claim of the insured for a total loss. There never was any ambiguity whatever in the attitude of the defendant.

See Judge's Charge, Record, 140, 141.

Acts of the insurer are construed as an acceptance of an abandonment, when a reasonable man would suppose that an acceptance was implied or intended by them. In the case at bar it would never have entered into the mind of a reasonable man, and it never did enter into the mind of the plaintiff, to suppose that the defendant had the slightest intention of accepting the plaintiff's abandonment. Suppose it had turned out to be for the plaintiff's interest to accept the goods when tendered to it at Velasco by the captain of the "Cactus"; it is clear that the defendant could not possibly have contested the plaintiff's right to them.

The case of *Richelieu Navigation Co.* v. *Boston Insurance Co.*, 136 U. S. 408, 433, seems to treat it as an open question if an offered abandonment can be accepted when the assured has no right to abandon; or if such acts as taking possession of the property insured "after a peremptory abandonment, *without qualification* or *reservation*, are such acts as imply and constitute an acceptance of the abandonment." However this may be, it can hardly be contended

that even such acts can turn the most explicit refusal of an abandonment into its acceptance.

In the case at bar not only did the defendant immediately refuse to accept the abandonment when first offered, but it did so again as soon as the second offer of abandonment was made by the plaintiff at Velasco. It would be more reasonable to contend that the plaintiff's second abandonment at Velasco was a recognition of the invalidity of its first offer to abandon, than to contend that the defendant's repeated refusals to accept an abandonment were equivalent to an acceptance, and its insistence that the property in the goods still remained in the plaintiff was the equivalent of an assertion that the goods belonged to the defendant.

See Record, pages 115, 127.
Shepherd v. *Henderson*, 7 App. Cas. 49, 62.

It must always be borne in mind that there is a principle of the law of insurance at least as important as that which concerns the acceptance of an abandonment — a principle which should receive its full application in this case. The interest of the community requires that both insured and insurer should labor with their utmost energy for the preservation of the goods insured. Under the old form of policy some courts tended to hold that a taking possession of or a dealing with the goods insured by the insurer after an abandonment amounted to an acceptance of the abandonment.

See *Peele* v. *Merchants' Insurance Co.*, 3 Mason 27, 85.

In consequence of this tendency, property insured was sometimes allowed to perish because neither insured nor insurer dared to meddle with it; the one, for fear that he should be deemed to have revoked his abandonment; the other, for fear that he should be deemed to have accepted it. The "sue and labor" clause in some form was therefore inserted in the policy to enable both parties to labor for the preservation of the goods without affecting their rights, and this clause, whether regarded as a new stipulation or merely as a statement of the true principle of the common law of insurance, should in the interest of the community receive a generous application. The policy provides not only that the assured may sue, labor and travel for the safety of the goods, etc., but also contains an

explicit stipulation that the acts of the insurer in recovering, saving and preserving the property shall not be considered an acceptance of an abandonment. The object of this stipulation, of course, is to provide that acts, otherwise unlawful, or which otherwise might be construed as an acceptance of an abandonment, shall by virtue of the stipulation, become lawful and without prejudice to the rights of the insurer.

See

Judge's Charge, Record, page 140.

Munroe v. *The British and Foreign Insurance Co.*, 52 F. R. 777, 788.

In *Schuyler* v. *The Phœnix Insurance Co.*, 56 Hun. 493, the cargo was injured by perils insured against. The "sue and labor" clause in the policy was essentially the same as that in the case at bar. The insurer removed the cargo from the damaged vessel, delivered the uninjured part to the plaintiff, and sold the rest, paying the plaintiff the net proceeds. It was held as a conclusion of law that there was no such dealing with the cargo as to make it a total loss; yet in that case the evidence of abandonment was much stronger than in the case at bar, for the insurer did not merely deliver some of the goods at their destination, but also sold some of them without authority from the insured, in order to prevent further damage.

In *Thompson Steel Co.* v. *Boylston Insurance Co.*, 12 Mo. App. 244, the insurance was on iron shipped in a barge; the barge sank, the insured abandoned, and the insurer, after some delay, caused the goods insured to be raised and forwarded to their destination. It was held that the insured could not recover, and the Court said, "The mere act of abandonment confers no right on the assured, unless it be accepted by the insurer or be done under circumstances which render the right unquestionable." In that case, as in the case at bar, the plaintiff's abandonment was not justified by the facts; in that case, as held by Judge Putnam in the case at bar, the defendant procured the delivery of the goods insured at the port of destination, and yet in that case the plaintiff was not permitted to recover. We submit that *Thompson Steel Co.* v. *Boylston Insurance Co.* is a precise authority on the point presented here. Such cases as *Northwestern Transportation Co.* v. *Continental Insurance Co.*, 24 F. R. 171, *Norton* v. *Insurance*

Co., 16 Ill. 235, depend upon the principle that, if the insurer deals with the property insured, he must deal with it in a reasonable manner and not negligently or wantonly injure the insured.

We think we have shown that, even if it be assumed that the forwarding of the goods from Key West to Velasco was the act of the defendant, yet that this act, being reasonably done for the care and preservation of the property, cannot be taken as transforming an unqualified refusal to accept the abandonment into an unqualified acceptance of the same. However the plaintiff may now criticise the conduct of the defendant in forwarding the goods, there can be little doubt that, if the injured goods had been uninsured, the plaintiff itself would have forwarded them in substantially the same manner. To have sold them at Key West would have been impossible or at least improvident. It was not shown (Record, page 88), nor could it have been shown, that the acts of the defendant have caused the plaintiff any loss or deprived it of any profit. We believe that the defendant acted in the exercise of its rights as an insurer, but even if it erred in its construction of those rights yet its error does not make it liable for a total loss.

See Record, page 142.

It is asserted in plaintiff's brief (page 25), that "the purpose of the saving and forwarding of the cargo to the port of destination was not in order to save property, but to prevent the plaintiff from recovering his insurance."

This is not a fair statement of the facts. It would be more correct to say that the plaintiff's purpose in refusing to accept the goods was to cause them, at a forced sale, to realize less than fifty per cent. The defendant litigated this question fully before the Circuit Court (Judge's Charge, Record, page 149), and took exceptions to the rulings under which a fifty per cent loss resulted (Record, pages 132, 133). From the time that the "Benjamin Hale" went aground, the plaintiff made no attempt to save the goods, but bent all its energies to the pursuit of the insurance money. The motive of the defendant in helping to save the goods and in advising their forwarding from a place where they were worthless to the place where they were most valuable, was, doubtless, in part, to save its own pocket. The interest of the defendant was to save the goods, the plaintiff acted as if its in-

terest was to leave them to perish and to depreciate their value. With the advice and help of the defendant they were brought to their destination worth a very considerable sum of money. If the plaintiff had not injured their market by refusing to receive them when tendered, their value would doubtless have been very much greater than the price brought by them at a forced sale. The sole object of the sue and labor clause in an insurance policy is to make it for the pecuniary interest of the parties to save the goods; to make the private interest of the insurer coincide with the general interest of the community in preventing a loss of valuable property; to give the insurer a pecuniary interest in the preservation of the goods insured. In doing what it did t insurance company in all good faith was protecting its own pocket and the interests of the public at the same time.

3. It is further argued by the plaintiff that there was such delay in forwarding the goods from Key West to Velasco as amounts to an acceptance of the abandonment. Admitting, in this place, for the sake of argument, that the forwarding was done by the defendant, and that for such delay as actually existed the defendant was responsible, yet we are unable to find any evidence of any unreasonable delay whatsoever; on the contrary, the evidence seems to show that the goods could not have been forwarded to Key West at any time before they were sent forward by the "Cactus." Had the goods been uninsured, and had the plaintiff itself used the utmost expedition reasonably possible, they would have reached Velasco no sooner.

Again, the plaintiff contends that the sale of the goods made at Velasco amounts to an acceptance of the abandonment. On this point it is sufficient to say that if, previous to the sale, there was a constructive total loss and a sufficient abandonment, then the defendant was liable before the sale, and his liability was not increased by it. If, on the other hand, the facts previous to the sale did not constitute an acceptance of the abandonment by the defendant, then the goods after their arrival at Velasco were at the plaintiff's risk, and, as the sale was made with the plaintiff's knowledge, and without its interference, the defendant cannot be made responsible for any loss which the plaintiff sustained thereby. The sale of the goods does not affect the case one way or the other.

The plaintiff also contends that the defendant is liable by reason of

the difference between the terms of the charter of the "Cactus" and those of the charter of the "Benjamin Hale." Supposing, for the purposes of this argument, that the forwarding of the goods was actually done by the defendant, we cannot do better than adopt the language of the Judge's Charge. (Record, page 144.) This was one of the minor matters which "should have been raised at the time if it was to be insisted upon by the plaintiff." Such matters "cannot be taken advantage of here now, not having been insisted on at the time when they occurred." "If they had then been insisted on they could have been easily adjusted by the underwriters, and the difficulties removed." Hanna, the defendant's agent, instructed Moreno to see that the cargo was shipped according to the original bill of lading, and probably Moreno so advised Hall; we suppose that the defendant never heard of the matters now complained of until the trial of the case. There is no evidence that the defendant or any of its agents ever saw the charter party of the "Cactus." We contend, as stated above, that the instructions of Hanna to Moreno did not contemplate a forwarding by the defendant, but only advice to the captain of the "Benjamin Hale" to forward. If, however, they be taken as contemplating an actual forwarding by the defendant, then they show that the defendant attempted to pay all charges, and would have paid those complained of, if requested by the plaintiff. In this connection we would call attention to the letter written by the defendant's agent (Record, page 127), in which the defendant specifically asked the plaintiff upon what grounds the abandonment was based. It is clear that no ground was suggested except the general liability of the defendant for a constructive total loss of the goods insured. See telegram of plaintiff to Cragin, Record, page 34. In *Dickey* v. *Insurance Co.*, 4 Cow. 222, 244, the Court said: —

"Undoubtedly the assured has a right to claim that his possession shall be absolute and perfect. He is not bound to relinquish his claim for a total loss, if, in reality, there is a lien or incumbrance attached to the vessel. But the abandonment was not put on this ground; it is stated to be in consequence of the disaster and the great injury to the voyage. In making the abandonment, the assured must assign the true causes. If he assign an insufficient cause, he is bound by it, and cannot avail himself of a new subsequent event without a new abandonment."

If, as we contend, and as the Circuit Court of Appeals stated, the ounder opinion" is that the forwarding was not the act of the endant, but that of the captain of the "Benjamin Hale," then, of urse, the defendant was not responsible for its insufficiency.

III.

As to the plaintiff's suggestion that in deciding this case the urt is bound by the decisions of the Supreme Court of Massa- usetts, we cannot do better than adopt the statement of Judge tnam's Charge (Record, pages 137, 138):—

"I will give counsel my views about this case. I desire to simplify, much as possible, the questions that go to the jury. This was, doubtedly, a Massachusetts contract. It was delivered in this ate by the agent of the defendant company, and, clearly, it is thin *Equitable Life Assurance Society* v. *Clements*, 140 U. S 226."

"So far, therefore, as any local usages which have become a part the subject-matter of underwriting marine risks in Massachusetts e concerned, this court would be bound to adopt the law as estab- hed by the decisions of the State court; yet, so far as a question mes up which is not one of mere local usage, but of general law, a question of the interpretation of a commercial instrument, like a licy of insurance, although what we are seeking to discover is, of urse, the law in Massachusetts, yet, nevertheless, we are not gov- ned by the decisions of the Courts of Massachusetts, but by those the Supreme Court of the United States, so far as we can find cisions bearing on the questions involved, and, so far as we do not d them, then by the general trend of authority."

See *Gloucester Insurance Co.* v. *Younger*, 2 Curt. 322.

And in a case of marine insurance almost similar to this, where the e of Massachusetts was thought to differ from that of United ates courts, Mr. Justice Story said:

"I am aware that a rule somewhat different has been laid down by e Supreme Court of Massachusetts, for whose judgments I enter- in the most unfeigned respect. But questions of a commercial d general nature, like this, are not deemed by the Courts of the nited States to be matters of local law, in which the Courts of the

United States are positively bound by the decisions of the State courts. They are deemed questions of general commercial jurisprudence, in which every court is at liberty to follow its own opinion, according to its own judgment of the weight of authority and principle."

Robinson v. *The Commonwealth Insurance Co.*, 3 Sumner, 225.

The case of *Jackson* v. *Eden*, 12 Wheaton, 153, relied upon by the plaintiff, was a case of the title to real property, an admitted exception to the general rule laid down in *Smith* v. *Tyson*, 16 Peters, 1, and prior thereto.

Upon the whole case, therefore, we submit that the judgment of the Circuit Court should be affirmed, affirmed by the Circuit Court of Appeals.

To hold that the defendant is liable for a constructive total loss of the goods insured, would be to reverse the rule of insurance law laid down in many cases, and unquestioned except in Massachusetts, where the rule applicable to the case at bar is not yet settled.

To hold that the defendant's acts done after his express refusal to accept the abandonment amounted to an acceptance of it, would be to disregard the view of the facts taken by both the Circuit Court and the Circuit Court of Appeals, which view is, furthermore, reasonable and well founded.

FREDERIC J. STIMSON,
of Counsel.

No. 203. 96

Supp. Br. of Stimson for Resp't.

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Supreme Court of the United States.

OCTOBER TERM, 1898. No. 203.

THE WASHBURN & MOEN MANUFACTURING CO.,
Plaintiff,

v.

THE RELIANCE MARINE INSURANCE CO.,
Defendant.

SUPPLEMENTARY BRIEF OF THE DEFENDANT,

THE RELIANCE MARINE INSURANCE CO.

FREDERIC JESUP STIMSON,
of Counsel.

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NOTES ON THE ORIGIN, HISTORY AND REASON OF THE MEMORANDUM CLAUSE, AND OF THE AMERICAN OR MOIETY DOCTRINE OF CONSTRUCTIVE TOTAL LOSS.

Mr. Justice Story, in *Marcadier* v. *Chesapeake Ins. Co.*, 8 Cranch. 39, says expressly that the "exact *quantum* of damage which shall authorize an abandonment as for a total loss" had never then (1814) become the direct subject of adjudication in the English courts, and that the American rule, based on the celebrated treatise, *Guidon de la Mer*, was already then established, by which damage exceeding the moiety of the value of the thing insured is sufficient to authorize an abandonment, "but this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles."

The *Guidon de la Mer* (edition of Paris, by J. M. Pardessus, 1831), dating probably between 1556 and 1584, was adopted by Louis XIV., in 1681, and, says the editor, still forms the common law of Europe. Chapter V. is on averages (*Avaries*), and Article VIII. reads as follows: —

"*En grains, vin, sel, conserves, figues, raisins, oranges, melasses, harengc, olives, et autres provisions de vivres, parce qu'il advient quelquefois, avant estre deschargées, qu'elles sont empirées, ou, se gardant dans le navire, s'eschauffent, aigrissent, fondent, empuantissent, coulent, se gastent l'une l'autre, l'asseureur ne porte nulle telle sorte d'avaries; mais si, par tourmente, ce que dessus fust advenu, par jet fait en mer, pillerie ou depredation, l'asseureur payera l'avarie, si elle excede pour le regard des dits vivres cinq pour cent.*"

And Chapter VII., Article I., begins as follows: —

"*Il est en liberté du marchand chargeur faire delais* (*abandonment*) *à ses asseureurs, c'est-à-dire, quitter et delaisser ses droits, noms, raisons et actions de la proprieté qu'il a en la marchandise chargée, dont il est asseuré, quand il advient naufrage du tout ou de partie, ou bien avarie qui excede ou endommage la moitié de la marchandise.*"

It will be seen that the first paragraph above cited is the foundation of the memorandum clause, while the second is the foundation of the American doctrine of constructive total loss.

Martin, in his History of Lloyd's (London, 1876), tells us (page 46) that the policy in the Guidon de la Mer "corresponds exactly

with that adopted in England as early as the beginning of the seventeenth century," and then gives a copy of the policy in the Bodleian Library, dated 1613, which contains the use and labor, but not the memorandum clause. This latter was added to English policies in the year 1749, and runs as follows: —

"Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per cent; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent unless general or the ship be stranded."

The English form of memorandum has never contained the words "perishable articles," although the articles were in fact perishable. Upon this point Manley Hopkins says: "The catalogue of exempted or partially exempted articles called the warranty or memorandum has been frequently varied or modified. As new productions have been added to commerce, and a greater experience has been obtained of those previously known, insurance companies have taken their own view of the risk attaching to merchandise, and whilst adopting the Lloyd's memorandum for their basis, have rearranged it to their own satisfaction. One company adds *saltpetre* in the list of goods free from average, another introduces *rice* in the number of those made free under five per cent, a third classes *jute* (a fibre only imported in late years) with hemp and flax. Indian offices excluded altogether from particular average metals and liquids, and, in general, raise the scale of exclusion from average. Different insurers take their own view; and, when they use the Lloyd's policy, make specific variations from the established memorandum in writing. Such arrangements between the insured and insurer in this part of the policy resolve themselves into questions of premium." (Manual of Marine Insurance, London, 1867, page 145.)

The earliest case discussing the memorandum clause is that of *Wilson* v. *Smith*, 3 Burrow, 1550 (1764), in which Lord Mansfield says: "The words 'free from average unless general can never mean to leave the insurers liable to any particular average."

The first text book discussing the clause is Millar's Law of Insurance (London, 1787) which says (page 357): —

"It is worthy of notice, that, in consequence of this clause, 'free of average,' it is necessary to adopt a different view of what consti-

tutes the distinction between a total and partial loss. It was formerly laid down, that a total loss is *whatever defeats the voyage.* This will not hold, however, where, in the *case* of perishable commodities, the underwriter has secured himself by the memorandum above stated. Here the subject must be actually gone. For what is the underwriter's view? To defend himself against the *perishable nature* of particular commodities, which renders them peculiarly liable to certain accidents. He means to be secure from all damage arising in consequence of that peculiar nature, whether such damage be great or small; whether it *defeats the voyage*, or only diminishes the price of the goods. The effect of the memorandum, therefore, is to prevent a loss from being considered as *total*, so long as the subject is in existence; *in order to abandonment*, it must be burnt, sunk, captured, or otherwise completely destroyed."

Joseph Marryat, M. P., in a pamphlet entitled "Observations upon the Report of the Committee on Marine Insurance" (London, 1810), defends the usage of Lloyd's in insisting on the memorandum clause, on the ground that before its adoption "the underwriters at Lloyd's submitted to pay most enormous averages on goods shipped to Hamburgh and Bremen. When goods arrived to a falling market, certificates were procured that they were all damaged more or less, and according to the courteous phraseology used on those occasions, they were immediately sold at public sale for the benefit of the underwriters, but in point of fact at a loss of forty or fifty per cent."

The present English rule which makes total extinction of value at an intermediate port, after setting off the actual value of the goods against the cost of reconditioning and reshipping, ground for abandonment, grew up *since* the adoption in the courts of New York and the United States, of the American rule exempting memorandum articles from constructive total loss; and could not now be adopted without doing away with the other American rule under which a loss of only a moiety is a constructive total loss of non-memorandum articles. The American doctrine was firmly established before English law assumed its modern shape, and the difference is fully recognized in the most recent English text books.

Thus Crump on Marine Insurance (London, 1875) says, "For the American law see *The Great Western Co.* v. *Fogarty* . . . and cases cited in the judgment," which case the editor cites from 30 Law Times Reports, n. s. 613, where the decision was reprinted in England.

And the most recent English text book (1887), while declaring

Cocking v. *Fraser* overruled in so far as it states that nothing short of "absolute destruction of the goods by the wreck of the ship" would suffice, goes on to say that "in the United States the rule in *Cocking* v. *Fraser* is supported to its fullest extent."

2 Arnould's Marine Insurance, page 1006.

The earliest case found in any American report appears to be that of *Gardiner* v. *Smith*, 1 John. Cases, 141, decided in the Supreme Court of New York in 1799, where Chief Justice Lansing merely refers to the American doctrine of constructive total loss as "the rule which has been established where a moiety is lost."

Kent, in the first edition, Vol. 3, p. 244 (1828), says, discussing *Cocking* v. *Fraser*:—

"Considering the difficulty of ascertaining how much of the loss arose by the perils of the sea and how much by the perishable nature of the commodity, and the impositions to which insurers would be liable in consequence of that difficulty, the rule of construction, as settled in that case, is very salutary, by reason of its simplicity and certainty." And then, after recognizing that its authority has been in some respects shaken in England, he says: "But in our American Courts, the doctrine of the case of *Cocking* v. *Fraser* is the received law."

So, in 1817, the Supreme Court of New York says (Yates, J.):—

"On this subject the courts of K. B. and C. P. in England are somewhat at variance. . . . We have adopted the doctrine of the King's Bench" (*Cocking* v. *Fraser*).

Saltus v. *Ocean Ins. Co.*, 14 John. 138, at p. 145.

Mr. Eugene P. Carver, of counsel for the plaintiff, petitioner, on the point that damage to cargo by reason of a protracted voyage is not a sea peril within the meaning of a policy of marine insurance, desires, in addition to his brief, to cite the case of

Perry *v.* Cobb, 88 Maine, 435, pages 440–447.

FREDERIC J. STIMSON,
of Counsel.

Supreme Court of the United States.

No. 6.—October Term, 1900.

The Washburn and Moen Manufacturing Company, Petitioner, *vs.* The Reliance Marine Insurance Company (Limited).	On writ of certiorari to the United States Circuit Court of Appeals for the First Circuit.

[October 15, 1900.]

This was an action at law brought in the Superior Court of Massachusetts for the county of Suffolk, and thence removed into the Circuit Court of the United States for the District of Massachusetts, by the Washburn and Moen Manufacturing Company against the Reliance Marine Insurance Company (Limited) of London, England, on a policy of marine insurance taken out, March 15, 1893, in the sum of forty-eight thousand, eight hundred dollars, on a cargo of wire shipped from Boston to Velasco, Texas, on the schooner Benjamin Hale, John Hall, master.

The memorandum clause of the policy ran thus: "Memorandum. It is also agreed that bar, bundle, rod, hoop and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting and cassia, except in boxes, free from average under twenty per cent., unless general; and sugar, flax, flaxseed and bread are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under ten per cent., unless general."

And on the margin the following was stamped or written: "Free of particular average, but liable for absolute total loss of a part if amounting to five (5 %) per cent."

It was also provided: "And in case of any loss or misfortune, it shall be lawful and necessary to and for the assured, their factors, servants and assigns, to sue, labor, and travel for, in and about the defense, safeguard and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or

insurers in recovering, saving and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment; to the charges whereof, the said assurers will contribute according to the rate and quantity of the sum herein insured."

The Benjamin Hale sailed for Velasco, March 31, 1893, and on April 15 ran ashore on Bahama Banks, but, after throwing overboard two hundred reels of barbed wire, floated and proceeded. On the night of April 19 the schooner again ran ashore, on Bird Key, near Dry Tortugas, and largely filled with water. Wreckers came on board April 21. The master went to Key West, and from thence telegraphed the Washburn and Moen Company, April 24, that the vessel was ashore, and he thought the loss was total. April 24, 25 or 26 the agent of that company told the agent of the insurance company, in Boston, "what he knew in regard to the troubles, and said that he wished to abandon the cargo to the underwriters." April 29 a written notice of abandonment was given, which the insurance company explicitly declined to accept. The master returned at once with further assistance, reaching the wreck the morning of April 25, and the vessel was floated April 29, and finally taken to Key West, arriving May 4. The captain testified that "from the time the vessel went ashore until she came off they were taking the cargo out as they could so as to get her off. . . . Think about one-half of cargo was discharged on the reef, of which he thinks about thirteen hundred reels were dry." This was substantially all carried to Key West, where the unloading was completed May 10.

Captain Hall made a memorandum at Key West as to the condition of the cargo when landed there. From this it appeared that out of 13,051 reels of barbed wire, shipped from Boston, 12,277 (or 12,625) were landed at Key West, of which 989 were perfectly dry, and 10,448 had received "hardly perceptible" damage. Of plain wire, 1,102 bundles were shipped, and all landed at Key West, and 464 were stated to be nearly dry. Five reels of salamander wire and a wire rope were all landed and transhipped dry and unimpaired; also 243 kegs of staples out of 249; and 478 bundles of hay bands out of 1,050.

Libels for salvage were filed against vessel and cargo at Key West, and the schooner condemned and sold, but the cargo was released and the amount decreed in respect thereof paid by the insurance company.

The goods were forwarded from Key West to Velasco on the schooner Cactus, where they were tendered to the Washburn and Moen Company, which refused to receive them. That company again abandoned, and the insurance company again declined to accept abandonment.

At this time a very large part of the goods existed in specie, and a considerable part was practically uninjured. There were no facilities for

handling and no market for barbed wire at Key West, but there were at Velasco, which was also but sixty miles by rail from Houston, the headquarters of the general agent of the manufacturing company in Texas.

The goods were afterwards sold by order of court on the libel of the master of the Cactus for freight, demurrage and expenses, and realized $10,000. Plaintiff was not present and made no bid at the sale.

As the cost of saving the cargo and bringing it to Key West, and expenses there, exceeded the sum realized at forced sale, and the freight to Velasco added some hundreds of dollars to that, plaintiff contended that the cost was more than the value at Key West, and at Velasco.

In respect of the forwarding of the cargo from Key West to Velasco, the charter party was signed by Captain Hall as master of the Benjamin Hale. This was in Boston several days after Hall had left Key West, but there was evidence that he had previously authorized the agents of the vessel at Key West, and who paid for the discharge of the cargo there, to charter the Cactus, and the second bill of lading was signed by one of them as attorney in fact for Captain Hall, and stated that the goods were shipped by him.

The agent for the board of underwriters testified that he instructed the agent at Key West to see that a vessel was secured and the cargo properly shipped to Velasco according to the original bill of lading; that Hall authorized the Cactus to be chartered; and that he always insisted that Hall should forward the cargo; while Hall said that he received a request from defendant's agent to so forward.

The Circuit Court ruled that the defendant was not liable for a constructive total loss; that the transhipment of the cargo at Key West, though made by the underwriters as he thought it was, did not, under the circumstances, make them liable for the property as underwriters; and that "inasmuch as a portion of this cargo—a considerable portion, including the staples, and a very large percentage of the fencing wire—was at Key West in a condition to be transhipped, and did in fact arrive at Velasco in specie, and suitable for the purposes for which it was intended, although not so suitable as it would have been if it had not been submerged in the sea," there was no absolute total loss of the whole.

It was agreed that there was an actual total loss of parts of the cargo to the amount of $2,500; and that, under the views expressed by the court, plaintiff was entitled to a finding that there was a constructive total loss.

Accordingly a verdict was directed for $2,500, and a special verdict "that there was a constructive total loss."

Judgment was rendered in favor of plaintiff, and each party prosecuted a writ of error from the Circuit Court of Appeals.

That court concurred in the rulings of the Circuit Court, but was of opinion that the cargo was forwarded from Key West to Velasco under authority of the captain of the Benjamin Hale. 50 U. S. App. 231.

Judgment having been affirmed, the Washburn and Moen Manufacturing Company applied for and obtained a writ of certiorari from this court.

Errors were relied on by petitioner, in substance, that the Circuit Court erred in not ruling that plaintiff was entitled to recover for a constructive total loss under the policy; and in not allowing the question whether there was an absolute total loss to go to the jury; or the question whether defendant had accepted plaintiff's abandonment of the cargo.

Mr. Chief Justice FULLER delivered the opinion of the Court:

By the memorandum, wire of all kinds was expressly "warranted by the assured free from average unless general;" and by the rider, "free of particular average but liable for absolute total loss of a part if amounting to five per cent."

The memorandum and marginal clauses were *in pari materia* and to be read together. They were not contradictory, and the rider merely operated to qualify the memorandum by allowing recovery for an actual total loss in part, which could not otherwise be had. In other words, the qualification was manifestly inserted so that, while conceding that under the memorandum clause no liability was undertaken for a constructive total loss, but only a liability for an actual total loss, the insurers might be held for an actual total loss of a part.

The contracting parties thus recognized the rule that articles warranted free of particular average, or free from average unless general are insured only against an actual total loss.

The warranty or memorandum clause was introduced into policies for the protection of the insurer from liability for any partial loss whatever on certain enumerated articles, regarded as perishable in their nature, and upon certain others none under a given rate per cent. This was about 1749, and since then in the growth of commerce, the list of articles freed by the stipulation from particular average has been enlarged so as to embrace many, which, though they may not be inherently perishable, are in their nature peculiarly susceptible to damage.

The early form ran as follows: "Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides and skins are warranted free from average under five pounds per cent.; and all other goods, and also the ship and freight, are warranted free from average under three pounds per cent. unless general or the ship be stranded."

In 1764, Lord Mansfield in *Wilson* v. *Smith*, 3 Burrow, 1550, held that the word "unless" meant the same as "except," and that "the words 'free from average *unless general*' can never mean to leave the insurers liable to any *particular* average."

In *Cocking* v. *Fraser*, 4 Douglas, 295, (1785) the Court of King's Bench held, Lord Mansfield and Mr. Justice Buller speaking, that the insurer was secured against all damage to memorandum articles unless they were completely and actually destroyed so as no longer physically to exist.

Chancellor Kent in his Commentaries commended this rule as "very salutary, by reason of its simplicity and certainty," "considering the difficulty of ascertaining how much of the loss arose by the perils of the sea, and how much by the perishable nature of the commodity, and the impositions to which insurers would be liable in consequence of that difficulty;" and declared that notwithstanding the authority of *Cocking* v. *Fraser* had been shaken in England, the weight of authority in this country was "in favor of the doctrine that in order to charge the insurer, the memorandum articles must be specifically and physically destroyed and must not exist in specie." He added, however, that it had been "frequently a vexed point in the discussions, whether the insurer was holden, if the memorandum articles physically existed, though they were absolutely of no value." 3 Kent, (1st ed., 1828), 244; 12th ed. *296.

The general rule is firmly established in this court that the insurers are not liable on memorandum articles except in case of actual total loss, and that there can be no actual total loss where a cargo of such articles has arrived, in whole or in part, in specie, at the port of destination, but only when it is physically destroyed, or its value extinguished by a loss of identity. *Biays* v. *Chesapeake Ins. Co.*, (1813), 7 Cranch, 415; *Mareardier* v. *Chesapeake Ins. Co.*, (1814), 8 Cranch, 39; *Morean* v. *United States Ins. Co.*, (1816), 1 Wheat. 219; *Hugg* v. *Augusta Ins. &c. Co.*, (1849), 7 How. 595; *Insurance Co.* v. *Fogarty*, (1873) 19 Wall. 640. And see *Robinson* v. *Insurance Co.*, 3 Sumner, 220; *Morean* v. *Insurance Co.*, 3 Wash. Cir. Ct. Rep. 256.

Biays v. *Chesapeake Ins. Co.* was a case of insurance upon hides, of which some were totally lost; some were saved in a damaged condition; and some were uninjured. This court overruled the contention that there could be a total loss as to some of them, notwithstanding the memorandum clause, and Mr. Justice Livingston said:

"Whatever may have been the motive to the introduction of this clause into policies of insurance, which was done as early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality—or whatever ambiguity may once have existed from the term *average* being used in different senses, that is as signifying *a contribution to a general loss*, and also a *particular or partial injury* falling

on the subject insured, it is well understood at the present day, with respect to such [memorandum] articles, that underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average. It only remains then to examine, and so the question has properly been treated at bar, whether the hides, which were sunk and not reclaimed, constituted a total or partial loss within the meaning of this policy. It has been considered as total by the counsel of the assured, but the court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite eight hundred were lost, making in point of value somewhat less than one-sixth part of the sum insured by this policy. If there were no memorandum in the way, and the plaintiff had gone on to recover, as in that case he might have done, it is perceived at once that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue, (which in this case amounts to much the greatest part), arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so, as long as a part continues to be less than the whole. This loss then being a particular loss only, and not resulting from a general average, the court is of opinion that the defendants are not liable for it."

In *Marcardier* v. *Chesapeake Ins. Co.*, some of the goods insured were warranted "free from average, unless general," and damages were claimed for a constructive total loss of these goods, but the claim was disallowed. After stating the American rule that a damage of ordinary goods exceeding fifty per cent. entitles the insured to recover for a constructive total loss, Mr. Justice Story continued:

"But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety in value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed."

In *Robinson* v. *Commonwealth Ins. Co.*, 3 Sumner, 220, where a clause in the policy exempted the insurers from liability for any partial loss on goods esteemed perishable in their own nature, and the goods insured were held to be perishable, the same eminent judge charged the jury:

"The principle of law is very clear, that, as this is an insurance on a perishable cargo, the plaintiff is not entitled to recover, unless there has been a total loss of the cargo by some peril insured against. If the schooner had arrived at the port of destination, with the cargo on board, physically in existence, the plaintiff would not have been entitled to re-

over, however great the damage might have been by a peril insured against, even if it had been ninety-nine per cent., or in truth even if the cargo had there been of no real value."

Part of the cargo in *Morean* v. *United States Ins. Co.* was warranted free from average, unless general, and Mr. Justice Washington said:

"All considerations connected with the loss of the cargo, in respect to quantity or value, may, at once, be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception.

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial loss. There is no instance where the insured can demand as for a total loss that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and, consequently, he cannot elect to turn it into a total loss. . . . The only question that can possibly arise, in relation to memorandum articles, is, whether the loss was total or not; and this can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagements; everything like a promise of indemnity against loss or damage to the cargo being excluded from the policy."

In *Hugg* v. *Augusta Ins. Co.*, the insurance was upon freight on a cargo of jerked beef, perishable articles being warranted free from average, and it was held that defendant was not liable for a total loss of freight unless it appeared that the entire cargo was destroyed in specie. The memorandum clause is given in the margin.* Mr. Justice Nelson, delivering the opinion of the court, made these, among other, observations:

"What constitutes a total loss of a memorandum article has been the subject of frequent discussion, both in the courts of England and this country, and in the former of some diversity of opinion; but, in most of the cases, the decisions have been uniform, and the principle governing the question regarded as settled; and that is, so long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a

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*"It is also agreed, that bar and sheet iron, wire, tin plates, salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise), cheese, dry fish, vegetables and roots, hempen yarn, cotton bagging, pleasure carriages, household furniture, furs, skins, and hides, musical instruments, looking glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp free from average under twenty per cent., unless general; and sugar, flax, flaxseed, and bread are warranted by the assured free from average under seven per cent., unless general; and coffee in bags or bulk, and pepper in bags or bulk, free from average under ten per cent., unless general."

total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial. . . .

"The only doubt that has been expressed in respect to the soundness of this rule is, whether a destruction in value for all the purposes of the adventure, so that the objects of the voyage were no longer worth pursuing, should not be regarded as a total loss within the memorandum clause, as well as a destruction in specie. . . . In this country the rule has been uniform, that there must be a destruction of the article in specie, as will be seen by a reference to the following authorities. . . .

"Whether the test of liability is made to depend upon the destruction in specie, or in value, would, we are inclined to think, as a general rule, make practically very little, if any, difference; for while the goods remain in specie, and are capable of being carried on in that condition to the destined port, it will rarely happen that on their arrival they will be of no value to the owner or consignee. The proposition assumes a complete destruction in value, otherwise the uncertainty attending it would be an insuperable objection; and, in that view, it may be a question even if the degree of deterioration would not be greater to constitute a total loss than is required under the present rule.

"The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriter against the strong temptation that may frequently exist, on the part of the master and shipper, to convert a partial into a total loss."

The case came up on a certificate of division, and the answer to the first question certified was:

"That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination."

The cases in this court are reviewed and applied by Mr. Justice Miller in *Insurance Co.* v. *Fogarty*, in which it was ruled that where certain machinery had been so injured as to have lost its identity as such, recovery for total loss might be sustained.

The same conclusion has been announced in many of the State courts. *Brooke* v. *Louisiana Ins. Co.*, 5 Mart. N. S. 530, 535; *Skinner* v. *Western Ins. Co.*, 19 La. *273; *Gould* v. *Ins. Co.*, 20 La. Ann. 259; *Williams* v. *Kennebec Ins. Co.*, 31 Maine 455; *Waln* v. *Thompson*, 9 Serg. & R. 115; *Willard* v. *Man. Ins. Co.*, 24 Mo. 561; *Wadsworth* v. *Pacific Ins. Co.*, 4 Wend. 33; *De Peyster* v. *Sun Ins. Co.*, 19 N. Y. 272; *Burt* v. *Brewers' Ins. Co.*, 9 Hun 383; *S. C.*, 78 N. Y. 400; *Chadsey* v. *Guion*, 97 N. Y. 333; *Merchants' S. S. Co.* v. *Mutual Ins. Co.*, 19 Jones & S. 444; *Carr* v. *Security Ins. Co.*, 109 N. Y. 504.

It is said that a different rule has been laid down in Massachusetts by the Supreme Judicial Court of that Commonwealth. *Kettell* v. *Alliance Ins. Co.*, 10 Gray, 144; *Mayo* v. *India Mut. Ins. Co.*, 152 Mass. 172.

Even if this were absolutely so we should not feel constrained, though regretting the difference of opinion, to depart from our own rule. The policy was a Massachusetts contract, it is true, but its construction depended on questions of general commercial law, in respect of which the courts of the United States are at liberty to exercise their own judgment and are not bound to accept the State decisions as in matters of purely local law.

We are not, however, persuaded that the cases cited justify the asserted conclusion as respects articles specifically included in the memorandum.

In *Kettell* v. *Alliance Ins. Co.*, the memorandum clause of the policy provided that the insurers should not be liable for any partial loss on, among other articles, "salt, grain, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding." At the end of the last paragraph of the policy, next before the formal conclusion, were printed these words: "Partial loss on sheet iron, iron wire, brazier's rods, iron hoops and tin plates, is excepted."

The shipment consisted of five hundred boxes of tin plates, invoiced and valued together at one sum. The vessel was wrecked; all the plates damaged more or less; and some of them totally destroyed. Chief Justice Shaw ruled, for the court, that the exception did not come under the memorandum clause; that it recognized a distinction between tin and brass goods liable to tarnish, and memorandum articles liable to decay; and that the natural construction of the exception was "that it leaves the insurer liable for all total losses; but it makes no distinction between absolute and constructive total losses; and in case of a constructive total loss, which gives the assured a right to abandon, and he exercises the right, it becomes a legal total loss, as if absolute in its nature." The insurers were held liable for a constructive total loss under the fifty per cent. rule.

In the case before us wire of all kinds was specifically exempted by the memorandum clause, and the exemption was relaxed by the rider in respect of absolute, that is, actual, loss of a part.

If the contract in that case had been in terms and arrangement the same as the contract in this, it does not follow that the same result would have been reached.

But we must not be understood as accepting the views expressed in Kettell's case, great as is the weight attaching to the utterances of the distinguished judge who delivered the opinion. We do not think the words, "partial loss excepted," had any other meaning as applied to tin plates than if applied to articles having an inherent tendency to decay. Tin plates may not be perishable in their nature in the sense of liability to corporeal destruction, but their original character as tin plates is perishable by reason of liability to corrosion and rust. And this may explain why the words, "and happen by stranding," were omitted from the exception.

It appears to us that the natural meaning of the exception was to exempt the underwriters from liability for an actual partial loss, and, therefore, for a constructive total loss, which involves an actual partial loss, and a remainder transferred by abandonment.

Mayo v. *India Ins. Co.*, 152 Mass. 172, follows the prior case, but the court expressly refused to decide "whether in this Commonwealth there can be no total loss of a memorandum article, if any part of it arrives at the port of discharge in specie."

It would subserve no useful purpose to attempt a review of the English cases on this subject. If in England a plaintiff may recover for a constructive total loss of memorandum articles, it is when they are so injured as to be of no substantial value when brought to the port of destination.

In the United States (and herein is a material difference between the jurisprudence of the two countries), the general rule is that a damage exceeding fifty per cent. justifies abandonment and recovery as for constructive total loss. *Marcardier* v. *Chesapeake Insurance Company*, *supra*; *Le Guidon* (Paris, 1831) Chap. VII, Art. I; Chap. V, Art. VIII. But this principle is not applicable to memorandum articles in respect of which the exception of particular average excludes a constructive total loss.

There is no pretence here that this wire, with some small exceptions duly allowed for, did not exist at Key West and did not arrive at Velasco in specie, and as to a large part with its original character unimpaired. Abandonment is necessary when the loss is only constructively total, and under this policy no right of abandonment existed at the time of the disaster or afterwards, by the exercise of which the assured could turn this partial loss in fact into a total loss by construction.

The salvage charges at Key West were paid by the underwriters as incurred to avert an impending actual total loss of the whole subject of the insurance. It was to their particular interest, as well as to the general public interest, that the goods should be saved, and it is apparent that plaintiff could not injure their market by refusing to receive them, and then claim that their value was determined by the price they brought at forced sale.

Counsel conceded that the cargo was damaged to an amount exceeding fifty per cent., and that, therefore, there was a constructive total loss according to the American rule applicable to non-memorandum articles. But there was not an actual loss of the whole, and by the memorandum and rider the insurance company was exempted from liability except for the actual loss of a specific part, and for that plaintiff has duly recovered.

The Circuit Court correctly ruled that under the terms of the policy plaintiff could not recover for a constructive total loss of the goods insured; and, inasmuch as a large part of the goods reached Velasco in specie, a substantial part of them being wholly uninjured, was right in declining to permit the jury to pass on the question of actual total loss.

There is nothing taking the case out of the general rule. The forced sale certainly does not affect it.

After some previous jettison the cargo passed through the wreck, and the bulk of the wire, some damaged and much uninjured, arrived at the port of destination.

The consignee, which was also the manufacturer, refused to accept it, and declined to put an end to the proceedings which were instituted to its knowledge. If there had been a constructive total loss and a sufficient abandonment prior to the sale, defendant was then liable. As there was not, and no right to abandon or acceptance of abandonment, the goods were at plaintiff's risk, and defendant was not responsible for any loss plaintiff sustained by the sale.

But, although, as we have seen, plaintiff had no right to abandon, and although defendant specifically refused to accept an abandonment, it is contended that defendant transhipped the wire, and that such transhipment amounted to an acceptance of abandonment.

The Circuit Court of Appeals was of opinion that the forwarding from Key West to Velasco was done under the authority and with the approval of the captain of the Benjamin Hale. As the cargo was in a condition for transhipment, and there was opportunity to effect it, defendant rightfully insisted that it was the duty of the master to forward it to the destined port.

Yet even if the underwriters chartered the Cactus and forwarded the cargo, we agree with both courts that neither that nor any other act disclosed by the evidence would have authorized the jury to find that defendant had accepted the attempted cession of the cargo.

The sue and labor clause expressly provided that acts of the insurer in recovering, saving and preserving the property insured, in case of disaster, were not to be considered an acceptance of abandonment. Whether regarded as embodying a common law principle, or as new in itself, the clause must receive a liberal application, for the public interest requires both insured and insurer to labor for the preservation of the property. And to that end provision is made that this may be done without prejudice.

The Circuit Court of Appeals well points out that at Key West there was no agent of the assured; no adequate means of protection, and no market; while at Velasco there were excellent facilities for protection and handling of cargo; easy access to the company's head agency; and a good market; and it was the port of destination.

If then it was the insurer that carried the property, to be preserved and carried, to Velasco, where it was offered to the consignees, such labor and care rendered in good faith did not operate as an acceptance of abandonment, and especially as there was no right to abandon and a distinct refusal to accept.

Acts of the insurer are sometimes construed as an acceptance, when the intention to accept is fairly deducible from particular conduct, in the absence of explicit refusal. Silence may give rise to ambiguity solvable by acts performed. Here, however, defendant refused to accept, and there was no ambiguity in its attitude; and what was done, if done by it, was no more than it had the right to do without incurring a liability expressly disavowed. There was nothing to be left to the jury on this branch of the case.

Some further suggestions are made, but they call for no particular consideration.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.